Petition

81-1499

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No. ....

IN THE

Supreme Court of the United States

October Term, 1981

COLORADO SPANISH PEAKS RANCH, INC., etc. (Defendant-Cross-Claimant-Appellant),

Petitioner,

vs.

THE TRAVELERS INSURANCE COMPANY, etc. (Plaintiff-Cross-Defendant-Appellee),

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Motion to Reverse Judgment of the Court of Appeals for the Ninth Circuit and the United States District Court for the Central District of California and to Reinstate Judgment of Bankruptcy Judge.

MARVIN NEBEN,
NEBEN & STARRETT, INC.,
180 Newport Center Drive,
Newport Beach, Calif. 92660,
(714) 640-9933,
Counsel for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Questions Presented.

1. Did the United States District Court and the United States Court of Appeals for the Ninth Circuit err in finding that the Parol Evidence Rule precluded the introduction of evidence showing modification of the original agreement under circumstances where the trial court factually found that Appellant had been defrauded or mislead and that the circumstances of such modification were necessary in order to effectively allow the party to the contract, thus mislead, from proceeding with the proper implementation thereof?

2. Did the United States District Court and the United States Court of Appeals for the Ninth Circuit err in failing to comply with Rule 810 of the Rules of Bankruptcy Procedure by not accepting the Referee's Findings of Fact without proper appellate findings that they were "clearly erroneous" and in failing to give due regard to the opportunity of the Referee, the trial judge, to judge the credibility of the witnesses? There being a dispute among the Circuits relative to the weight to be given to the trial judge's determination of facts and the ability, or propriety, of the Appellate Courts to overrule same.

3. Did the United States District Court and the Court of Appeals for the Ninth Circuit err in failing to allow the Bankruptcy Court to order the property sold and the liens transferred to the proceeds as an administrative function of the Bankruptcy Court and the property thus liquidated for the benefit of the parties pending the determination as to the validity of the lien and/or the amount due to the lienholder?

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Motion to Reverse Judgment of the Court of Appeals for the Ninth Circuit and the United States District Court for the Central District of California and to Reinstate Judgment of Bankruptcy Judge.

I.
Introduction.

The Petitioner, Colorado Spanish Peaks Ranch, Inc.,[1] Debtor, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit entered in this Proceeding on November 16, 1981, and further, for an order reversing

[1]Statement pursuant to Rule 28.1. Colorado Spanish Peaks Ranch, Inc. has no parent corporation, subsidiary corporations or affiliates, except that South Park Land & Livestock Co., Inc., a Colorado corporation has some common officers and directors.

the Order and Judgment of said Court and of the District Court for the Central District of California and reinstating Order of the Bankruptcy Judge in said District.

II.
Opinion Below.

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 661 F.2d 759 (1981). (See Appendix A for Reported Opinion.) The Opinion of the District Court for the Central District of California was not reported, but is set forth in Appendix B in full. The Judgment of the Bankruptcy Judge (trial court) was not reported, but is set forth in Appendix C to this Petition. The Petitioner's Petition for Rehearing before the United States Court of Appeals for the Ninth Circuit, which was timely filed, was denied by Order entered and filed on December 8, 1981, as set forth in Appendix D to this Petition.

III.
Jurisdiction.

The Judgment of the Court of Appeals for the Ninth Circuit (Appendix A, *infra*) was entered November 16, 1981. A timely Petition for Rehearing was denied on December 8, 1981 (Appendix D). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

IV.
Statement of Case.

Introduction.

This matter arises out of a transaction which took place between the Petitioner (Appellant, Colorado Spanish Peaks Ranch, Inc., Debtor), and Respondent (Appellee, Travelers Insurance Company), whereby Petitioner, for the purpose of providing funds necessary to create a subdivision of a 29,000 acre ranch in Huerfano County, Colorado, borrowed

approximately $900,000.00 from Respondent (Travelers). At the time of the loan, it was acknowledged that the purpose of the loan was to subdivide the land into approximately 815, 36 (or more) acre parcels, as ranchettes, for sale, and for resale. The note and mortgage provided a release provision so that as a sale took place of a particular subdivided portion, that that particular portion, as sold to a buyer, could be freed from the underlying encumbrance which covered the entire ranch in favor of Respondent (Appellee, Travelers Insurance Company). The trust deed provided a release provision, however, conditioning any such release to the extent that no partial release would be given unless the underlying indebtedness was then current. Immediately prior to the execution of the said document, Petitioner (Appellant), through its principal officer, Mr. Keller, advised counsel for Respondent (Travelers, the only attorney or party handling the documents) that such a limited release provision would be inadequate and that the release provision, as thus documented, effectively would prevent the resale of such parcels for, as is the case in this type of sale, where a buyer purchases a parcel with a small down payment, he should be entitled to pay the applicable amount for the release of the parcel that he purchased from the underlying encumbrance holder at such time as the underlying encumbrance may come in default and the respective buyer should always be able to free that particular parcel from the underlying encumbrance by the mere payment of the applicable release amounts. Counsel for Respondent (Appellee, Travelers Insurance Co.) was also factually found by the trial court to have represented Petitioner (Colorado Spanish Peaks Ranch, Inc., Debtor). At the time of execution of the encumbrance, counsel for Respondent (Travelers Insurance Company, Appellee), who had likewise been found to be counsel for Petitioner (Colorado Spanish Peaks Ranch, Inc., Debtor,

Appellant), advised Petitioner's officers that he would be the party handling any such transactions and that Appellant would not have to worry about such a consequence, that if a problem like that developed, he would take care of it satisfactorily. That subsequent thereto, and after the subdivision was created and sales started, and prior to the time that any default existed on the underlying encumbrance, the Petitioner made demand upon Respondent to affirm that the buyers who had purchased up to that time, and those who would subsequently purchase, would be able to obtain partial release of the underlying encumbrances to cover their purchased parcel in the event that Petitioner ever became in default of the underlying encumbrance. At that point, Respondent indicated refusal to so do, and therefore, Petitioner was forced to stop their sales program and not proceed with efforts in that regard. As a result, Respondent (Travelers) caused a foreclosure suit to be filed. Immediately upon filing of the foreclosure suit, Petitioner (Debtor) filed its Chapter XI of the Bankruptcy Act (11 U.S.C. §11).

The matters came on for hearing before the Bankruptcy Judge, Russell B. Seymour (trial judge) based upon the Complaint filed by Petitioner (Debtor) seeking leave to proceed with sale of the properties and transfer of liens to the proceeds, and a Complaint filed by Respondent (Appellee) seeking leave to foreclose. Both Complaints were joined for trial.

Bankruptcy Judge Seymour (trial judge), upon presentation of the evidence submitted, found that Petitioner had been factually misled by the representations of counsel for Respondent (Travelers) who had also been acting as counsel for Petitioner, Appellant (Colorado Spanish Peaks Ranch, Inc., Debtor) and upon whom Petitioner relied. Therefore, an oral modification of the agreement by virtue of the representations made between the parties was permitted. The

Court further found that the property was to be a subdivided ranch and that by virtue thereof, its value, after costs of sale, etc., was at lest $2,500,000.00. The Court further found that Respondent (Travelers Insurance Company, Appellee) had breached the agreement between the parties and, therefore, was not entitled to any interest or attorney fees from the time of the breach and limited the amount due to Respondent (Appellee, Travelers) to the original principal amount of approximately $962,220.00, as was due when the breach took place. The Bankruptcy Court further provided a means for sale of the property and the payout of the obligation which was due to Respondent (Appellee, Travelers). The Bankruptcy Court further provided that in the event that the amount found due to Travelers, on appeal, was in excess of the principal obligation (which included interest and attorney fees,) that that obligation would be $1,317,489.53, and provided a manner and procedure for the sale and disposition of the property and the payment of the obligation. There were approximately 22 days of trial, 60 exhibits and 18 witnesses.

The matter was appealed to the District Court for the Central District of California and briefed and argued before District Judge Robert Firth in August of 1978. In August of 1979, the District Judge entered his Decision (Appendix B,) reversing the trial judge's Finding that the Parol Evidence Rule had been violated and finding that the value found by the Bankruptcy Judge was incorrect and ordering the matter remanded for further proceedings. The matter was thus sent back to Bankruptcy Judge Richard Mednick who had succeeded to the position of the original trial judge, and Judge Mednick summarily released the Stay (Rule of Bankruptcy Procedure 11-44) allowing Appellee to proceed with its foreclosure.

The matter was timely appealed to the United States Court of Appeals for the Ninth Circuit by Appellant, argued on May 5, 1981, before the Panel and its Decision was entered on November 16, 1981 (Appendix A), affirming the Order of the District Judge. A timely filed Petition for Rehearing was denied on December 8, 1981 (Appendix D).

V.

Reasons for Allowance of Writ.

The following reasons appear for the grant of the Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and for the Motion directing reversal of its Opinion and the Opinion of the District Court:

(1) No witnesses or other evidence was produced to the United States District Court or to the Ninth Circuit Court of Appeals. The Decision was based exclusively upon the transcript of the trial, testimony, the exhibits presented to it, the briefs, and arguments of the respective parties. Therefore, under Rule 810 of the Rules of Bankruptcy Procedure (pursuant to 28 U.S.C. §2075 per Order of Supreme Court of April 24, 1973, effective October 1, 1973), the Referee's (Bankruptcy Judge) Findings of Fact should be accepted on appeal unless they are "clearly erroneous" and the District Court on appeal "shall give due regard to the opportunity of the Referee to judge the credibility of the witness". Since the trial court had witnesses in front of it and from the witnesses presented and the evidence presented, including the exhibits, the Court found that Petitioner (Colorado Spanish Peaks Ranch, Inc., Debtor) had been misled and effectively defrauded; that the exception for acceptance of an oral amendment to a written document, as an exception to the Parol Evidence Rule, was a valid finding, based upon factual determinations. Further, the Bankruptcy Court had all evidence and witnesses relevant to the evaluation and

the best use of the property before it and made its determination of value as a factual determination. Neither of these factual determinations was found to be "clearly erroneous" by the District Judge as affirmed by the Circuit Court of Appeals for the Ninth Circuit. Neither Decision dealt with that particular question as to the trial court's Finding that the Petitioner (Colorado Spanish Peaks Ranch, Inc., Debtor) had been defrauded or misled by factual findings so as to bring into action that exception to the Parol Evidence Rule and neither Appellate Court gave "due regard to the opportunity of Referee to judge the credibility of witnesses" nor indicated how that credibility could have been questioned. As to the value of the Ranch, written appraisals were given by both sides and substantial testimony by experts was given as to the best and highest use of the property and its ability to be sold as subdivided ranches. As to enforcement of provisions of Rule 810, the Circuits seem to disagree.

(2) It is to be noted, that dealing with Rule 810 of the Rules of Bankruptcy Procedure, the Advisory Committee's Notes state, in part, as follows:

> "This rule is a revision of General Order 47, which courts have applied when reviewing referees' orders under §39c of the Act. *Potucek v. Cordeleria Lourdes*, 210 F.2d 527, 530 (10th Cir. 1962) Cert. Denied, 372 U.S. 930 (1963); *Allen v. Lokey*, 207 F.2d 579, 581-82 (7th Cir. 1962). The rule defined the judge's authority in disposing of judgments, orders and findings on review in conformity with §2a(10) of the Act and requires the same effect to be given the referee's findings as Rule 52(a) of the Federal Rules of Civil Procedure accords to the findings of the trial court. *Gross v. Fidelity & Deposit Co. of Md.*, 302 F.2d 338, 339 (8th Cir. 1962); *Simon v. Agar*, 299 F.2d 853 (2d Cir. 1962). The same standard is prescribed by Rules 752(a)

and 914, which govern the review of findings of fact in adversary proceedings and contested matters in bankruptcy cases, whether such findings are made by a referee or district judge. This rule is not subject to suspension or modification by local rule or order. See Rule 814. The rule does not retain the provision of General Order 47 authorizing receipt of further evidence by the district judge in connection with a review of a referee's order or findings. See 2 Collier ¶39.28 (1968)."

In dealing with this particular Rule, 2 Collier on Bankruptcy (14th Ed., page 1534) states, in part, as follows:

"On the other hand, if the findings were based upon conflicting evidence, especially where the credibility of witnesses whose testimony has been heard by the referee was involved, much greater weight attached to the referee's findings; and the rule was well established that the district judge, while scrutinizing them with care, should not disturb the referee's findings unless there was most cogent evidence of mistake and miscarriage of justice. In such a case, it was pointed out that the referee had the advantage of hearing and seeing the witnesses, and observing of their manner and demeanor. . ."

and, at page 1537:

"The situation is somewhat different under the rules. The Advisory Committee's Note to Rule 810 states that this rule, '. . . requires the same effect to be given the referee's findings as Rule 52(a) of the Federal Rules of Civil Procedure accords to the findings of a trial court. Since General Order 47 has been abrogated, the language upon which the court in *Duvall*,* based at least partially, their decision that the 'substantial evi-

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**Matter of Duvall* (C.C.A. 7th Cir.) 40 Am.B.R. (N.S.) 82, 103 F.2d 653.

> dence' rule did not apply to a review of the referee's judgments is no longer law. It seems then, that the 'substantial evidence' rule does not apply when reviewing a referee's judgment under the rules."

This problem has been dealt with in the recent case of *In Re Cadarette* (2nd Cir. 1979) 601 F.2 648, which dealt with the very problem of the credibility given to the findings of the trial judge. In that case, the Court of Appeals reversed the trial judge but under circumstances which can easily be determined to be a finding that the trial judge was clearly erroneous. At page 652 of the Opinion, Circuit Judge Milligan, the Decision states, in part, as follows:

> "Indeed, after the hearing, the Bankruptcy Judge characterized *Cadarette's* tale as 'bizarre and incredible'; nonetheless, he found the bankrupt's testimony 'forthright' and 'consistent'. The record points the other way."

In spite of the finding in that case, that indeed there was a clear, unquestioned, erroneous factual finding, the Court did state that based upon its prior Decision (*In Re Tabibian* (2nd Cir. 1961) 289 F.2d 793), that in the footnote on page 650 of the Decision, it states as follows:

> "3. In *In Re Tabibian, supra,* 289 F.2d at 795, we expressly rejected the proposition, accepted by some other Circuits, *e.g., Costello v. Fazio,* 256 F.2d 903 (9th Cir. 1958); *In re Pioch,* 235 F.2d 903 (3rd Cir. 1956), that findings by the Bankruptcy Judge of 'ultimate facts' should be reviewed more closely by both the District Courts and the Court of Appeals."

It would appear that the Circuits themselves are not following a uniform approach to this particular problem.

Where there have been factual determinations, both as to a party being misled so as to come within the "fraud" exception to the Parol Evidence Rule. See *Hall v. Linn,* 5

Pac. 641, 8 Colo. 264, and *Hall v. Rockwell* (1885) 6 Pac. 927, 8 Colo. 103 and *Johnson v. Cummings* (1898) 55 Pac. 269, 12 Colo. App. 17, as well as the California cases, including *Southern California District Council, Assemblies of God, a corporation, v. Shepherd of the Hills Evangelical Lutheran Church* (1978) 77 Cal.App.3d 951, as well as the factual evidence as to the valuation of the property itself and the determination of equity, as well as the other elements necessary for the Court to determine whether or not the property should be ordered sold and the liens transferred to the proceeds, there can be no question but that these Findings, based upon evidence presented to the Court, should not cavalierly be rejected, overruled and basically ignored.

(3) Petitioner further contended that in any event, the Bankruptcy Court has the right and power to order a sale of property and a transfer of liens to the proceeds, it being fundamental that the property would not obtain any greater sales value to the parties by a foreclosure sale than it would have been through a bankruptcy sale program. Neither appellant court dealt with the right of the Bankruptcy Judge, as a trial judge, to order a sale of the property and the transfer of the liens to the proceeds so as to provide means for the liquidation of the properties and the payment of the liens as was eventually found to be due in their proper amounts. The Petition for Rehearing before the Court of Appeals for the Ninth Circuit directed the attention of the Appellate Court to the above problems, but the Petition for Rehearing was summarily denied. (Appendix D, *infra*).

(4) The course followed by the District Court and the Court of Appeals for the Ninth Circuit frustrates the sound and efficient administration of justice and the administration of the Bankruptcy Court in performing its functions, liquidating the assets and dealing with liens claimed thereon. Decisions of both Appellate Courts, the District Court for

the Central District of California, and the Court of Appeals for the Ninth Circuit, are palpably erroneous, and effectively dilutes the ability of the Bankruptcy Court, as a trial court, effectively dealing with the property within its jurisdiction.

There has to be an approach to the treatment of the trial court's findings that itself is credible. The establishment of Bankruptcy Courts with Bankruptcy Judges and the formality which is, and should be, given to such a trial court, should properly be recognized and obviously that is the intent of Rule 810 of the Rules of Bankruptcy Procedure. Factual Findings should not be overruled unless they are so clearly erroneous that to do so would result in injustice. There really is not unanimity within the Circuits (witness the Decision in *In Re Cadarette* (2nd Cir. 1979) 601 F.2d 648 (*infra*, page 9). If there was some unanimity as to the posture of the trial court and the efficacy of its Findings, the inordinate voluminous amount of bankruptcy appeals to the District Court and up to the various Courts of Appeals could be lessened without subtantially affecting the rights of any litigant. The Circuit Court of Appeals for the Ninth Circuit has traditionally followed a rule of review of District Court and Bankruptcy Court Decisions, and although they profess to follow the "clearly erroneous rule", actually they do not. See *Bumb v. Paulin Motor Co.*, 454 F.2d 1149 (1972); *In Re Pioch*, 235 F.2d 903 (1936); *Costello v. Fazio*, 256 F.2d 903 (1958); *Union Bank v. Blum*, 460 F.2d 197 (1972). While professing adherence to the concept that Appellate Courts should be bound by the findings of the trial court unless they are "clearly erroneous". (The concept embodied in Rule 810 of the Rules of Bankruptcy Procedure), in fact, the Circuit Court of Appeals for the Ninth Circuit does not follow that procedure, which is absolutely recognized in the comments of the Second Circuit as pronounced in *In Re Cadarette* (*infra*, page 9). Trial petitioners

in Bankruptcy Courts should be able to rely on exact understanding of what matters would properly be subject to further determination on review or appeal. At the present level, the Appellate Court, pursuant to the procedures and cases followed by the Circuit Court of Appeals for the Ninth Circuit places every litigant in doubt as to the effective nature of an initial trial and the Findings of the trial court. Inconsistency between the Circuits should be laid to rest.

VI.
Conclusion.

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted, and that the Motion to reverse the judgment of the Court of Appeals for the Ninth Circuit and the District Court for the Central District of California to reinstate the judgment of the Bankruptcy Judge should be granted.

Dated: February 8, 1982.

Respectfully submitted,

MARVIN NEBEN,
NEBEN & STARRETT, INC.,
180 Newport Center Drive,
Newport Beach, CA 92660,
Counsel for Petitioner.

Appendix

APPENDIX "A".

Reported Opinion.

In re Colorado Spanish Peaks Ranch, Inc., Debtor.

The Travelers Insurance Company, a Connecticut Corporation, Plaintiff-Cross-Defendant-Appellee, v. Colorado Spanish Peaks Ranch, Inc., etc., Defendant-Cross-Complainant-Appellant. Nos. 79-3533, 80-5257.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted May 5, 1981. Decided Nov. 16, 1981.

Appeals were taken from orders of the United States District Court for the Central District of California, Robert Firth and Lawrence T. Lydick, JJ., in proceeding under Chapter XI of the old Bankruptcy Act. The Court of Appeals, Duniway, Circuit Judge, held that: (1) under Colorado law, parol evidence rule precluded oral modification of note and deed of trust by discussions between representatives of the parties prior to and contemporaneously with execution of the mortgage, and (2) secured creditor was entitled to enforce its lien where any equity which debtor had in the property had been more than exhausted by interest, taxes and other payments made by creditor in order to protect its interest.

Affirmed.

Appeals from the United States District Court for the Central District of California.

Before DUNIWAY, PREGERSON and CANBY, Circuit Judges.

DUNIWAY, Circuit Judge:

These are two appeals from orders of the district court in a proceeding under Chapter XI of the old Bankruptcy Act. We affirm.

I. *Facts.*

The facts underlying the first appeal, No. 79-3533, are these:

In July, 1973, the Travelers Insurance Company (Travelers) loaned $900,000.00 to Colorado Spanish Peaks Ranch (Spanish), taking a note, secured by a first mortgage on 29,000 acres of Colorado mountain ranch land which Spanish planned to subdivide and sell to the public in parcels. The first payment on the loan was due in January, 1974, with further payments to follow. However, Spanish has never made any payments on the loan, either principal or interest, and Travelers, since making the loan, has been compelled to advance various property taxes and lease payments in order to protect its interest in the ranch.

Travelers filed a foreclosure proceeding in the Colorado state court, shortly after which, in August 1974, Spanish filed the Chapter XI petition which automatically stayed the state court foreclosure proceeding. Travelers then asked permission of the bankruptcy court to proceed with its judicial foreclosure. In response, Spanish counterclaimed, alleging breach of contract. It claimed that when the loan was made, Spanish intended, and Travelers knew that it intended, to subdivide the ranch and sell it off in 36 acre parcels. The note and deed of trust therefore contained provisions permitting parcels to be sold free and clear of the mortgage upon the payment of an agreed price per acre. The provision in dispute is a proviso which permits such release, "*provided that at the time of the release CSPR* (Spanish) *was current in its obligations under the note and mortgage.*" (Emphasis ours).

At or about the time the note and mortgage were executed there was some discussion between Mr. Keller, representing Spanish, and Mr. Palmes, attorney for Travelers, about the

interpretation of the proviso. Mr. Keller testified that he was told by Mr. Palmes "not to worry" about the clause as written. There is no written memorandum of any kind relating to any such alleged modification or interpretation. Nevertheless, the bankruptcy judge made the following finding: "Mr. Keller and Mr. Palmes orally modified the release provisions of the mortgage during their telephone conversations and meetings prior to and contemporaneously with the execution of the mortgage."

The bankruptcy judge further found that the terms of the note and trust deed, as so modified, had been breached when, late in 1973, Mr. Palmes stated that partial releases would not be executed by Travelers unless the loan was current. Because of this breach, the judge also found, Spanish was forced to cease its business operations. On this assumption and by making allowances for damages suffered by Spanish, the judge determined the amount of the indebtedness due Travelers to be the sum of $962,220.08 as of November 8, 1976. But the judge also found that, if his finding that Travelers breached the oral modification of the mortgage release clause was not sustained by the appellate courts, Spanish's indebtedness to Travelers would be the sum of $1,317,489.53 as of November 8, 1976.

As to the value of the ranch, Travelers produced two appraisers who testified that the market value of the property at that time was less than $1,340,000.00 as a working cattle ranch, which they opined was the highest and best use of the land. Spanish, on the other hand, produced no evidence of the fair market value of the ranch and no evidence as to the highest and best use of the land. Instead, it called a witness who was not qualified as an expert who testified that if the ranch lands were sold in parcels upon contract with 10%-15% down and the balance payable in installments

over a 10-year period, the land sales would gross $300.00 per acre.

The bankruptcy judge found that the fair market value of the ranch as of January 1, 1977 was a minimum of $2,500,000.00, and, presumably on this basis, refused to lift the stay on the state foreclosure proceedings.

II. *The Law.*

On Travelers' appeal to the district court, that court reversed, and held that Travelers is entitled to enforce its lien. The bankruptcy judge correctly held that Colorado law applies, and we find the parol evidence rule to be well established in that state. As the Colorado Court of Appeals has stated, the parol evidence rule ". . . is still alive and well in Colorado . . ." *Stevens v. Vail Associates, Inc.*, 1970, 28 Colo.App. 344, 348, 472 P.2d 729, 730. *See also Randolph v. Helps, Colo.*, 1886, 10 Pac. 245. Accordingly, the district court concluded that the bankruptcy judge's finding of a modification and breach of that modification cannot be upheld. We agree.

The district court held that the testimony of Spanish's valuation witness was worthless because, among other things, it rested upon the assumption that the land would be subdivided, yet no costs had been shown for preparing the land for sale. The district court took judicial notice that subdivision costs vary over a wide range and often exceed the cost of acquiring the property. It pointed out that Spanish made no attempt to prove the fair market value of the property. In determining whether or not there is a present equity, the indebtedness underlying the lien must be measured against the then market value of the property. The only relevant evidence of the market value of the property was that of Travelers' witnesses, that the market value was not in excess of $1,340,000.00. Deducting the amount of the

debt as of November 8, 1976, which the bankruptcy judge determined to be $1,317,489.53, a small equity would result. Even by 1979, however, it had been more than exhausted by interest, taxes, and other payments made by Travelers in order to protect its interest. Thus, Travelers was and is entitled to enforce its lien, as the district court found. *See Lance, Inc. v. Dewco Services, Inc.*, 9 Cir., 1970, 422 F.2d 778.

III. *The Second Appeal.*

On remand, the bankruptcy judge revoked the stay, thus permitting Travelers to foreclose. In the light of our decision on the first appeal, this was not error.

IV. *Mootness.*

Travelers suggests that the appeals are moot, because Spanish has arrived at an arrangement with its unsecured creditors, so that the purpose of the Chapter XI proceeding has been accomplished. However, in approving the arrangement, the bankruptcy judge expressly retained jurisdiction over Travelers and the mortgage pending decision by us, and by the Supreme Court if there be a decision by that Court. The appeals are not moot.

Affirmed.

APPENDIX "B".

Memorandum and Order Reversing Bankruptcy Judge.

United States District Court, Central District of California.

In re Colorado Spanish Peaks Ranch, Inc., Debtor.

The Travelers Insurance Company, a Connecticut corporation, Plaintiff, v. Colorado Spanish Peaks Ranch, Inc., etc., Defendant.

Colorado Spanish Peaks Ranch, Inc., etc., Cross-Complainant, v. The Travelers Insurance Company, a Connecticut corporation, Cross-Defendant. No. CV 78-0273-RF. (BK 74-11032-RM).

Filed: August 16, 1979.

This is an appeal from a judgment of the bankruptcy judge upon these facts:

In July, 1973, the appellant Travelers Insurance Company loaned $900,000.00 to the appellee debtor in possession Colorado Spanish Peaks Ranch (CSPR), taking as security a note and first mortgage on 29,000 acres of ranch land which the CSPR planned to subdivide and sell to the public in parcels.

The first payment on the loan was to have been made in January, 1974 with subsequent payments to follow. However, appellee has never made any payments on the loan, either principal or interest, and appellant, since making the loan, has been compelled to advance various property taxes and lease payments in order to protect its interest in the ranch.

Travelers filed a foreclosure proceeding in the Colorado state court, shortly after which, in August 1974, the debtor filed a Chapter XI petition in bankruptcy which, of course, automatically stayed the state court proceeding.

In the litigation which ensued in the bankruptcy court, Travelers filed a complaint for relief from the automatic stay, seeking permission to proceed with this judicial foreclosure. In its answer, the debtor made a counterclaim alleging breach of contract. Both complaint and counterclaim were then tried together before the bankruptcy judge.

In its counterclaim, the debtor contended that Travelers orally modified the provision of the release clause contained in the mortgage. It was the debtor's intention to subdivide the property and sell it off in parcels. The note and deed of trust therefore contained the usual provisions permitting parcels to be sold free and clear of the mortgage upon the payment of an agreed price per acre. The portion in dispute is the clause which permits such release, "*provided that at the time of the release CSPR* (debtor) *was current in its obligations under the note and mortgage*."

The record indicates that at or about the time the note and trust deed was executed there was some discussion between Mr. Keller, representing CSPR, and Mr. Palmes, attorney for Travelers, as to the manner in which the clause was to be interpreted. Mr. Keller alleges that he was told my [sic] Mr. Palmes "not to worry" about the clause as written. There is no written memorandum of any kind relating to any such alleged modification. Nevertheless, the bankruptcy judge made the following finding: "Mr. Keller and Mr. Palmes orally modified the release provisions of the mortgage during their telephone conversations and meetings prior to and contemporaneously with the execution of the mortgage."

The bankruptcy judge further found that the terms of the note and trust deed, as modified, had been breached when, late in 1973, Mr. Palmes stated that partial releases would not be executed by Travelers unless the loan was current. Because of this breach, the court found that CSPR was forced to cease its business operations. On this assumption

and by making allowances for damages suffered by CSPR, the bankruptcy judge determined the amount of the indebtedness due Travelers to be the sum of $962,220.88 as of November 8, 1976. But the bankruptcy judge further determined that in the event his finding relative to Travelers' breach of the oral modification of the mortgage release clause was not sustained by the appellate courts, CSPR's indebtedness to Travelers would be the sum of $1,317,489.53 as of November 8, 1976.

The rule that parol evidence is not admissible to vary, explain, or contradict the meaning of an unambiguous written document is so well established in the law that any citation of authority is unnecessary.

The bankruptcy judge correctly found that the applicable law was that of the state of Colorado, and we find the rule similarly well established in that state. Almost 100 years ago in *Randolph v. Helps*, 10 Pac. 245 (1885), the Colorado Supreme Court stated:

> "It is a familiar rule that extrinsic evidence is not admissible either to contradict, add to, subtract from, or vary the terms of a written instrument." 10 Pac. at 247

As recently as 1970, the Colorado Court of Appeals noted:

> "Defendants have strongly maintained that the deed created a merger and the only issue in this case is whether or not the parol evidence rule is still applicable in this state. They may rest assured that the rule is still alive and well in Colorado. . . ." *Stevens v. Vail Associates, Inc.*, 472 P.2d 729, 730 (1970).

Accordingly the bankruptcy judge's finding of a modification and breach cannot be sustained.

The bankruptcy judge further found that the fair market value of the ranch as of January 1, 1977 was a minimum

of $2,500,000.00, and presumably on this basis refused to lift the stay on the state foreclosure proceedings.

As to the value of the property, Travelers produced two appraisers who testified that the market value of the property at that time was less than $1,340,000.00 as a working cattle ranch, which they opined was the highest and best use of the land. CSPR produced no evidence of the fair market value of the ranch and no evidence as to the highest and best use of the land. Instead, it called a witness who was not qualified as an expert who testified that if sold in parcels upon contract with 10% - 15% down and the balance payable in installments over a 10-year period, the land sales would gross $300.00 per acre.

This testimony is irrelevant and immaterial. Such testimony rests upon the assumption that the land will be subdivided, yet no costs were shown for preparing the land for sale. The court takes judicial notice that subdivision costs vary over a wide range and often exceed the cost of acquiring the property. It further assumes that the purchase price will be paid over a 10-year period. No attempt was made to compute the fair market value of the property. In determining whether or not there is a present equity, the indebtedness underlying the lien must be measured against the then market value of the property. The only relevant evidence of the market value of the property is that given by Travelers' witnesses, wherein they testified that the market value was not in excess of $1,340,000.00 which, in view of the record, we are bound to accept. Deducting the amount of the debt as of November 8, 1976, which the bankruptcy judge determined to be $1,317,489.53, a small equity would result. By this time, however, it would be thoroughly exhausted by interests, taxes, and other payments made by Travelers in order to protect their interest.

In my view, therefore, Travelers is entitled to enforce its lien in accordance with the terms set forth in the note and trust deed, there being no admissible evidence of any modification thereof. I further find that the market value of the property does not exceed $1,340,000.00, and that the amount of the indebtedness from CSPR to Travelers as of November 8, 1976 is the sum of $1,317,489.53, in addition to which Travelers is entitled to recover interest accruing thereafter until paid, monies advanced for taxes and other purposes, attorneys' fees and costs to the extent that all of these are made a part of the indebtedness by the provisions of the note and trust deed.

Appellant's contention that the bankruptcy judge should have recused himself is without merit.

The decision of the bankruptcy judge is reversed and this case is remanded for further proceedings in accordance with this court's rulings.

DATED: August 14, 1979.

/s/ Robert Firth
ROBERT FIRTH
UNITED STATES DISTRICT JUDGE

APPENDIX "C".

Judgment.

United States District Court, Central District of California.

In re Colorado Spanish Peaks Ranch, Inc., Debtor.

The Travelers Insurance Company, a Connecticut corporation, Plaintiff, vs. Colorado Spanish Peaks Ranch, Inc., Defendants.

Colorado Spanish Peaks Ranch, Inc., etc., Cross-Complainant, vs. The Travelers Insurance Company, a Connecticut corporation, Cross-Defendant. No. BK 74-11032-RS.

Filed: December 19, 1977.

Plaintiff, The Travelers Insurance Company ("Travelers"), filed its Complaint For Relief From Automatic Stay on January 27, 1976, and Colorado Spanish Peaks Ranch, Inc. ("CSPR"), debtor in possession, having filed its Amended Answer to the Travelers Complaint and Counterclaim, the Court having considered the pleadings on file, the evidence adduced at trial, and the arguments of counsel, and having filed its findings of fact and conclusions of law contemporaneously herewith,

IT IS ORDERED, DECREED AND ADJUDGED as follows:

1. Pending further order of this Court, Travelers is denied relief under its Complaint for Relief from Automatic Stay filed on January 27, 1977.

2. On July 5, 1973, CSPR and other individuals executed a promissory note in the principal amount of $900,000 payable to Travelers (hereafter the "Note"). Concurrently therewith CSPR executed a mortgage dated July 5, 1973

and recorded on July 10, 1973 in Book 333 page 215 of the Official Records of Huerfano County, Colorado (hereinafter the Mortgage). The Mortgage secures the indebtedness of CSPR arising from the note and constitutes a valid and perfected first lien encumbrance on approximately 29,141 acres of real property located in Huerfano County, Colorado (hereafter the "Ranch"), as more particularly described in Exhibit "A" attached hereto and incorporated by reference herein. The obligations of CSPR to Travelers is further secured by a Collateral Assignment of State Leases executed on July 5, 1973. The Note, Mortgage and Collateral Assignment of State Leases are hereinafter collectively referred to as the "Loan Documents".

3. The release provisions of the Mortgage were orally modified as delineated in the findings of fact. Travelers breached said oral modification.

4. As a result of its breach, Travelers is not entitled to recover interest from January 1, 1974, to the date this Judgment becomes final and nonappealable; nor may Travelers recover its costs or attorney fees.

5. The debt of CSPR to Travelers as of the date hereof is fixed at $962,220.88, consisting of principal, interest from July 5, 1973 to December 31, 1973, taxes and lease payments made to the State of Colorado.

6. In the event that an appellate court modifies or reverses this Judgment, the debt of CSPR to Travelers, as of November 8, 1976, is fixed at $1,317.489.53.

7. CSPR is authorized to sell parcels of the Ranch in accordance with the following terms and conditions and, insofar as not inconsistent with this Judgment, such other terms and conditions as this Court shall order:

A. If those portions of this Court's Findings of Fact and Judgment which hold that: (1) Travelers

breached an oral modification of the release provisions of the Mortgage, and (2) CSPR's indebtedness to Travelers is limited to $962,220.88, become final and nonappealable, then within 30 days after this Judgment has become final and nonappealable, and prior to the sale of any portion of the Ranch by CSPR, CSPR shall:

(1) Pay to Travelers the sum of $30,786.86, consisting of interest accrued on the principal balance from July 5, 1973 to December 31, 1973 plus the real estate taxes and lease payments advanced by Travelers for the benefit of CSPR; and

(2) CSPR shall post with this Court, for the benefit of Travelers, a corporate surety bond or undertaking, or cash, or a certificate of deposit in favor of Travelers to guarantee the payment to Travelers of: (a) current real estate taxes on the Ranch; and (b) current lease payments on the leased land which is the subject of Travelers' Collateral Assignment of Lease; and (c) interest due on the unpaid principal baiance due Travelers for the 6-month period commencing on the date the Judgment becomes final and nonappealable; and (d) the next annual principal payment due Travelers under the Note, which amount is now fixed in the amount of $75,000, but the amount of the bond may be subject to modification after a noticed hearing upon the application of Travelers or CSPR. A copy of the bond or undertaking shall be served upon Travelers' counsel at the time the bond is posted. Travelers shall have 10 days after the bond or undertaking is received to except to the sufficiency of the sureties or the bond or undertaking. The requirements of this subparagraph for the posting of a bond or undertaking shall not be deemed satisfied until the time within which Travelers may except to the bond, undertaking or

sureties has expired without such exception being filed with this Court. In the event that Travelers files an exception to the bond, undertaking or sureties, the requirements of this subparagraph shall not be deemed satisfied until this Court rules on the sufficiency of the bond, undertaking or the sureties. In the event Travelers objects to the sufficiency of the bond, undertaking or sureties, a hearing shall be set before this Court within 10 days thereof, and the time period within which CSPR must comply with the provisions of paragraph 7A shall be extended to the date set for the hearing on Travelers' objection, and thereafter for such additional time, if any, as this Court may grant prior to the expiration of the time period, as extended.

(3) Thereafter, The periodic payments of principal and interest due from CSPR to Travelers under the Note shall be paid to Travelers in accordance with the schedule set forth in the Note, except that each payment date shall be deemed postponed by the amount of time elapsed from January 1, 1974, to the date this Judgment becomes final and nonappealable. For example, the first payment of principal and interest shall be due 6 months after this Court's Judgment becomes final and nonappealable, and the next interest payment shall be due 12 months after this Court's Judgment shall become final and nonappealable. Provided, however, the entire indebtedness due Travelers shall be due and payable on the third yearly anniversary after this Court's Order becomes final and nonappealable. CSPR is also required to pay when due all current real estate taxes and state lease payments as required by the "Loan Documents" (as defined in the Findings of Fact).

B. If those portions of this Court's Findings of Fact and Judgment which hold that: (1) Travelers

breached an oral modification of the partial release provisions of the Travelers Mortgage and (2) CSPR's indebtedness to Travelers is limited to $962,220.88, are reversed by the appellate court(s), then within 60 days after the appellate court(s) ruling becomes final and nonappealable, and prior to the sale of any portion of the Ranch by CSPR, CSPR shall:

(1) Pay to Travelers all indebtedness then due and owing by CSPR to Travelers under the terms of the "Loan Documents", without acceleration, including all past due principal, interest and costs incurred by Travelers in connection with the loan transaction, and CSPR shall bring current all obligations to third parties as required by the "Loan Documents"; and

(2) CSPR shall post with this Court, for the benefit of Travelers, a corporate surety bond or undertaking, or cash, or a certificate of deposit in favor of Travelers to guarantee the payment to Travelers of: (a) all current real estate taxes on the Ranch; and (b) current lease payments on the leased land which is the subject of Travelers' Collateral Assignment of Lease; and (c) the next interest payment due Travelers under the "Loan Documnts"; and (d) the next principal payment due Travelers under the "Loan Documents", which amount is now fixed in the amount of $75,000, but the amount of the bond may be subject to modification after a noticed hearing upon the application of Travelers or CSPR. A copy of the bond or undertaking shall be served upon Travelers' counsel, at the time the bond is posted. Travelers shall have 10 days after the bond or undertaking is received to except to the sufficiency of the sureties or the bond or undertaking. The requirements of this subparagraph for the posting of a bond or undertaking shall not be deemed satisfied until

the time within which Travelers may except to the bond, undertaking or sureties has expired without such exception being filed with this Court. In the event that Travelers files an exception to the bond, undertaking or sureties, the requirements of this subparagraph shall not be deemed satisfied until this Court rules on the sufficiency of the bond, undertaking or the sureties. In the event Travelers objects to the sufficiency of the bond, undertaking or secureties, a hearing shall be set before this Court within 10 days thereof, and the time period within which CSPR must comply with the provisions of paragraph 7B shall be extended to the date set for the hearing on Travelers' objection, and thereafter for such additional time, if any, as this Court may grant prior to the expiration of the time period, as extended.

(3) Thereafter, CSPR shall pay, when due, all payments required by the "Loan Documents" as set forth therein. Provided, however, the entire indebtedness of CSPR shall be due and payable on the third yearly anniversary after the order of the appellate court(s) becomes final and nonappealable.

C. After each of the following conditions have been satisfied, CSPR may offer for sale to the general public 36 acre or larger parcels of the Ranch, in accordance with the terms and conditions set forth in this Court's Judgment and, insofar as not inconsistent with this Judgment, such further Orders as this Court may hereafter enter:

(1) This Court's Judgment entered concurrently herewith shall have become final and nonappealable or the Order of the appellate court(s) shall have become final and nonappealable; and

(2) CSPR shall have satisfied the terms and conditions of subparagraph 7 A (1) and (2) or 7 B (1) and (2) hereof, whichever are applicable.

The provisions of this paragraph are without prejudice to the right of CSPR to request of the appropriate Bankruptcy Court (trial court or appellate court, as the case may be) that it be permitted to sell under this Judgment pending appeal upon the posting of a satisfactory bond guaranteeing the payment to Travelers of the entire indebtedness of CSPR to Travelers as is eventually found by the final and non-appealable order of this Court.

D. The sale of each individual 36 acre (or larger) parcel of the Ranch must be confirmed by an Order of this Court. No sale shall be confirmed by the Court unless Travelers shall have released the parcel to be sold as provided by subparagraph E hereof.

E. Provided that CSPR is in compliance with all the terms and conditions of this Judgment, and upon payment by CSPR to Travelers by Cashiers Check of $50.00 per acre for lands requested to be released from Travelers' Mortgage plus a $100.00 service charge per release request and payment Travelers shall execute a partial release from the Mortgage of the lands requested to be released and for which payment has been received. Any payments of $50.00 per acre contemplated by this subparagraph shall be applied to the principal balance of CSPR's indebtedness to Travelers and shall be credited against the periodic principal payments due Travelers as set forth in subparagraphs 7 A (3) or 7 B (3) hereof, whichever is applicable. Travelers shall be entitled to at least 15 days notice in writing of a request for release under this paragraph. Travelers' lien shall remain on those portions of the Ranch which have not been partially released by Travelers. Travelers shall not be required to issue partial releases of the portions of the Ranch specifically excluded from the partial

release provision of the Mortgage until the loan is paid in full.

F. In the event there is a dispute between CSPR and Travelers as to whether or not Travelers is obligated to execute a partial release pursuant to subparagraph E hereof, either CSPR or Travelers may file an application with this Court for a determination of whether or not Travelers is required to execute a partial release. The Court shall, upon at least 10 days notice to CSPR and Travelers, set a hearing on the application. In the event that this Court enters an order upon such an application requiring that a partial release be executed, Travelers shall execute the partial release within 5 days from the entry thereof, or upon failure to do so, this Court may enter an order effecting same.

G. CSPR, its officers, directors and agents shall not purchase any parcels of the Ranch except upon notice to Travelers and approval by this Court.

H. Within 10 days after receipt thereof, CSPR shall present to the court, with copies to Travelers, a report evidencing all written offers to purchase individual lots or properties as well as all sales of such lots or properties, which CSPR proposes for confirmation.

I. CSPR may, upon approval of this Court, borrow against the net proceeds from the sale of any parcel which has already been released from the Travelers' Mortgage.

J. CSPR shall comply with all applicable rules and regulations of the jurisdiction where parcels of the Ranch are sold.

K. In the event that CSPR shall become in default under any of the provisions of this Judgment, Travelers may apply to this Court for a determination of whether or not CSPR is in default. In the event that this Court determines that CSPR is in default under any of the provisions of this Judgment, CSPR shall have 10 days

after the entry of said order by this Court to cure the default. While CSPR is in default under any of the provisions of this Judgment or if the default is not cured as provided in this paragraph, Travelers shall not be obligated to execute partial releases as provided in subparagraph 7E hereof. If the default is not cured by CSPR within 10 days after this Court enters its order determining that CSPR is in default, Travelers may, without further Order of this Court: (1) proceed against the bond posted pursuant to subparagraph 7A(2) or 7B(2) hereof, whichever has been posted, and (2) proceed with its judicial foreclosure under the "Loan Documents" or, at Travelers' option, request a deed in lieu of foreclosure of the collateral the subject of the "Loan Documents", which deed in lieu of foreclosure shall be executed by a duly authorized officer of CSPR immediately upon Travelers' request. However, should Travelers request the deed in lieu of foreclosure and should CSPR refuse to execute it, this Court shall enter its Order conveying the collateral under the "Loan Documents" to Travelers.

Dated: December 19, 1977.

RUSSELL B. SEYMOUR
RUSSELL B. SEYMOUR
BANKRUPTCY JUDGE

EXHIBIT A.

Rider Attached to and Made a Part of Lawyer's Title Insurance Corporation.

Binder No. B893101 Schedule A

LEGAL DESCRIPTION

Township 26 South, Range 64 West of the 6th P.M.

SECTION 17: All that part of the E½ lying Southwesterly of the Southwesterly rim of the Rattlesnake Canyon and all that portion of the NE½SW½ and S½SW½ lying Southeasterly of the Southeasterly rim of the Cuchara Canyon;

SECTION 19: All that part of the NE½NE½ lying Southeasterly of the Southeasterly rim of the Cuchara Canyon;

SECTION 20: E½NE½; SW½NE½; SE½; N½SW½; NW½ excepting that part of the NW½NW½ lying Northwesterly of the Southeasterly rim of Cucharas Canyon;

SECTION 21: All, excepting only that part of the NE½ and the E½NW½ lying Northeasterly of the Southwesterly rim of the Rattlesnake Canyon;

SECTION 27: S½SW½

SECTION 28: N½; E½SE½; SW½; W½SE½;

SECTION 29: E½; N½SW½; SW½NW½

SECTION 30: SE½NE½; E½SE½;

SECTION 31: NE½NE½

SECTION 32: E½; E½SW½; SW½SW½; SE½NW½;

SECTION 33: NE½NE½; S½SE½; SW½; S½NW½; NW½NW½; S½NE½; NW½NE½; NE½NW½; N½SE½;

SECTION 34: E½NE½; SW½NE½; NW½NE½; E½NW½; SW½NW½; S½;

SECTION 35: W½SW½;

Township 27 South, Range 64 West of the 6th P.M.

SECTION 2: W½NW½; NW½SW½;

SECTION 3: All

SECTION 4: E½; N½NW½;

SECTION 5: N½N½; S½;

SECTION 6: S½NE½; S½; NW½;

SECTION 7: N½; W½SE½; SW½; E½SE½;

SECTION 8: N½N½; SW½NE½; S½NW½; S½;
SECTION 9: All
SECTION 10: E½; NW½;
SECTION 11: NW½; SW½; SW½; N½SW½;
SECTION 14: SW½NE½; W½SE½; W½;
SECTION 15: All
SECTION 17: S½; E½W½; SW½SW½; NE½; W½NW½; NW½SW½;
SECTION 18: W½E½; SE½SE½; W½; E½NE½; NE½SE½;
SECTION 19: NE½; S½; E½NW½; SW½NW½;
SECTION 20: All
SECTION 21: All
SECTION 22: All
SECTION 29: N½NW½; SE½NW½;
SECTION 30: N½; W½SE½; SW½
SECTION 31: E½NE½; NW½SE½; S½S½;
SECTION 32: W½NW½

Township 27 South, Range 65 West of the 6th P.M.

SECTION 1: S½SE½;
SECTION 9. E½; SW½; S½NW½; NE½NW½;
SECTION 10: E½; SW½; S½NW½; NE½NW½;
SECTION 11: NE½NE½; S½NE½; SE½; SE½SW½; W½NW½;
SECTION 12: All
SECTION 13: All
SECTION 14: NE½; N½SE½; W½;
SECTION 15: W½NE½; SE½NE½; N½SE½; SE½SE½; W½;
SECTION 16: E½SE½;
SECTION 21: E½;
SECTION 22: NE½; NE½SE½; S½SE½; W½ except part SW½ in Book 288, Page 223; S½NW½SE½ and a tract of land described as follows: Commencing at the NE corner of the NW½SE½ of Sec. 22, thence West 1320 feet to the NW corner of this NW½SE½ of Sec. 22, thence South on the subdivision line 500 feet, thence in a Northeasterly direction to a point on the East boundary 400 feet South of the Northeast corner of the NW½SE½ of Sec. 22, thence North to the place of beginning.

SECTION 23: S½; W½NW½; NE½NW½;

SECTION 24: NE½; S½;

SECTION 25: All

SECTION 26: All

SECTION 27: All

SECTION 28: E½, E½SW½; E½SW½SW½; that part of the SW½NW½ South of Highway No. 10;

SECTION 33: N½NE½; NE½NW½; E½NW½NW½;

SECTION 34: NE½; N½SE½; SW½SE½; W½;

SECTION 35: All

Township 28 South, Range 64 West of the 6th P.M.

SECTION 4: SW½SE½; SE½SW½; N½SW½;

SECTION 5: W½

SECTION 6: All

SECTION 7: N½; SE½; N½SW½; an undivided ½ interest in SE½SW½;

SECTION 8: All

SECTION 9: W½NE½; W½SW½; NW½;

SECTION 17: N½N½; SE½NW½;

SECTION 18: NE½; E½SE½; an undivided ½ interest in NW½; undivided ½ interest in NW½SW½

Township 28 South, Range 65 West of the 6th P.M.

SECTION 1: E½; SW½; E½NW½

SECTION 2: E½; E½W½;

SECTION 12: N½N½

All in Huerfano County, State of Colorado.

Notice of Entry of Findings of Fact and Conclusions of Law and Judgment.

United States District Court, Central District of California.

In re Colorado Spanish Peaks Ranch, Inc., Debtor,

The Travelers Insurance Company, a Connecticut corporation, Plaintiff, vs Colorado Spanish Peaks Ranch, Inc., Defendants.

Colorado Spanish Peaks Ranch, Inc., etc., Cross-Complainant, vs The Travelers Insurance Company, a Connecticut corporation, Cross-Defendant. No. BK 74-11032-RS.

Filed: December 20, 1977.

TO: SHUTAN & TROST
1880 Century Park East
Suite 1511
Century City, CA 90067

NEBEN & STARRETT
P.O. Box 4179
Anaheim, CA 92803

RICHARD M. MONEYMAKER, ESQ.
700 S. Flower St.
Suite 1702
Los Angeles, CA 90017

You are hereby notified that FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT in the above entitled matters were filed and entered on December 20, 1977.

You are further notified that said FINDINGS OF FACT AND CONCLUSIONS OF LAW was amended by the incorporation of MEMORANDUM AND ADDENDUM TO

FINDINGS OF FACT AND CONCLUSIONS OF LAW, pages 27, 28 and 29 appended thereto. A copy of each said page is attached hereto.

DATED: December 20, 1977

EDWARD K. KRITZMAN, CLERK
By /s/ Francisca M. Valera
Deputy Clerk

I hereby certify that this notice was mailed to the above named counsel on the 20th day of December, 1977.

/s/ Francisca M. Valera
Deputy Clerk

Findings of Fact and Conclusions of Law.

United States District Court, Central District of California.

In re Colorado Spanish Peaks Ranch, Inc., Debtor.

The Travelers Insurance Company, a Connecticut corporation, Plaintiff, vs. Colorado Spanish Peaks Ranch, Inc., Defendants.

Colorado Spanish Peaks Ranch, Inc., etc., Cross-Complainant, vs. The Travelers Insurance Company, a Connecticut corporation, Cross-Defendant. No. BK 74-11032-RS.

Filed: December 19, 1977.

Plaintiff, The Travelers Insurance Company ("Travelers"), having filed its Complaint For Relief From Automatic Stay on January 27, 1976, and Colorado Spanish Peaks Ranch, Inc. ("CSPR"), debtor in possession, having filed its Amended Answer to the Travelers Complaint and Counterclaim, and the Court having considered the pleadings on file, the evidence adduced at trial, and the arguments of counsel,

NOW, THEREFORE, the Court makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. On August 28, 1974 CSPR filed in this District an original petition under Chapter XI of the Bankruptcy Act. No receiver has been appointed, and the debtor has remained in possession.

2. On September 19, 1974, a motion was made by C & C Investment Company to dismiss the Chapter XI proceeding or alternatively to transfer the case to the Bankruptcy Court in Colorado. On October 8, 1974 Fredrick R. Ross moved to transfer the proceedings to Colorado. On

October 30, 1974 Travelers filed a motion to transfer the proceeding to Colorado.

3. On November 21, 1974 Bankruptcy Judge Walker granted each of the above motions. CSPR appealed that Order.

4. On March 10, 1975, CSPR filed a complaint directed to numerous lien holders, including Travelers, seeking an order authorizing the sale of real estate owned by CSPR free and clear of the defendants' liens. CSPR's Complaint was taken off calendar without prejudice, pending a disposition of the venue problem.

5. On November 30, 1975 the United States District Court, Central District of California, reversed the Order of November 21, 1974 transferring the CSPR proceedings to Colorado.

6. On January 27, 1976 Travelers filed a Complaint For Relief From Automatic Stay and requested preference on the Court's calendar pursuant to Rule 11-44(d). On February 19, 1976 an Answer and Counterclaim were filed by CSPR. On February 27, 1976 CSPR filed an Amended Answer and Counterclaim, and Travelers answered the Counterclaim. On April 6 and 7, 1976 a pre-trial conference was held. On May 24, 1976 a continued pre-trial conference was held, and this Court ordered that the merits of CSPR's Complaint to sell free and clear of liens would be determined in conjunction with the Complaint For Relief From Automatic Stay. On June 3, 1976 CSPR filed a Second Amended Answer to Complaint For Relief From Automatic Stay and Counterclaim; and Travelers answered the Counterclaim. CSPR's Second Amended Answer incorporated by reference, as an affirmative defense, CSPR's March 10, 1975 Complaint For Order Authorizing Sale of Property Free and Clear of Lien or Other Interest.

7. Travelers did not file a timely objection to the jurisdiction of the Court, excepting that it did contend that the Bankruptcy Court in connection with a Rule 11-44 complaint had no authority to grant to CSPR any relief based on asserted fraud by Travelers in refusing to carry out an asserted release clause provision; or to impose a judgment for damages.

8. In Denver, Colorado, on July 5, 1973, CSPR, by its officers, executed a promissory note in the sum of $900,000 (the "Note"), payable to Travelers (Plaintiff's Exhibit 5). Weldon Knight, as an individual and Ray David Keller as an individual also executed the Note. The terms of the Note provide, in part, that CSPR was to pay interest on the unpaid principal balance of the Note semi-annually at the rate of 8.75% per annum commencing on January 1, 1974. Principal payments on the Note in the amount of $30,000 per annum were to be paid annually commencing on July 1, 1974, with the balance payable on July 1, 1983. The principal or unpaid balance thereof, or any installment thereof due and unpaid, and all interest due and unpaid was to draw interest at the rate of 11% per annum after maturity. The Note also provided that CSPR would reimburse Travelers for attorneys fees and costs incurred in collecting on the Note.

9. In Denver, Colorado, on July 5, 1973, CSPR, by its officers, executed a mortgage (hereinafter the "Mortgage"), constituting an encumbrance on approximately 29,141 acres of real property owned by CSPR and located in Huerfano County, Colorado (hereinafter the "Ranch") as security for the Note. On July 10, 1973, the Mortgage was recorded in Book 333, page 215 of the Official Records of Huerfano County, Colorado. (Plaintiff's Exhibit 6). The terms of the Mortgage are complete as set forth in said document. As

against CSPR, the Mortgage constitutes a first lien encumbrance against the Ranch.

10. In Denver, Colorado, on July 5, 1973, CSPR, by its officers, executed, as security for the Note, a collatral assignment of state leases in favor of Travelers. (Plaintiff's Exhibit 7). (The documents described in Findings of Fact 7, 8 and 9 [Plaintiff's Exhibits 5, 6 and 7] are hereinafter collectively referred to as the "Loan Documents").

11. Travelers was first contacted by CSPR in connection with the loan transaction in Colorado Springs, Colorado. All meetings (other than some telephone conversations) held in connection with the negotiation of the loan and the preparation of the "Loan Documents" were held in Colorado. At the time the "Loan Documents" were executed, and at all relevant times thereafter, CSPR was a Colorado corporation with offices in Colorado. The Travelers loan commitment letter (Defendant's Exhibit I) was mailed by the Denver, Colorado office of Travelers to the Cascade, Colorado office of CSPR. Each of the "Loan Documents" were executed in Denver, Colorado. The Mortgage (Plaintiff's Exhibit 6) signed by CSPR states that "this mortgage and the notes secured hereby shall be governed and construed according to the laws of the State of Colorado at the date of execution." The loan proceeds were dispersed to CSPR in Denver, Colorado. The collateral for the obligations of CSPR to Travelers under the "Loan Documents" is located in Colorado. The notice of default under the Mortgage was sent by the Denver, Colorado office of Travelers to the Cascade, Colorado office of CSPR. Travelers commenced judicial foreclosure proceedings under the "Loan Documents" in Colorado. At the time the "Loan Documents" were executed, Ray David Keller and Robert Keller resided in Beverly Hills, California, Ellsworth Nel-

son resided in Colorado, and Weldon Knight resided in Texas.

12. The "Loan Documents" entered into by CSPR and Travelers were not entered into to evade the law of the State of California.

13. Travelers fully disbursed the loan proceeds to or for the benefit of CSPR in Denver, Colorado. Specifically, a loan fee of $3,000 was deducted by Travelers, $847,000 was disbursed on July 13, 1973, and $50,000 was disbursed on August 9, 1973. From the loan proceeds, $1,000 was paid to Robert Palmes, Esq., as an attorney fee for preparation of a mineral opinion on the Ranch, as required by Travelers. No other monies were paid by CSPR, or its principals, to Robert Palmes.

14. At no time has CSPR paid Travelers any principal or interest as required by the "Loan Documents".

15. On January 10, 1974, Travelers made demand upon CSPR for payment for the $36,434.02 interest payment due Travelers on January 1, 1974. The demand letter was received by CSPR on or about January 11, 1974.

16. Prior to September 5, 1975, real estate taxes on the Ranch for the tax years 1972, 1973 and 1974 were due and unpaid. Travelers paid $22,072.66 to cure the delinquencies on September 5, 1975, which sums have not been paid by CSPR to Travelers. Under the "Loan Documents" sums so advanced for taxes are obligations of CSPR to Travelers. CSPR remains obligated to Travelers for the $22,072.66 of real estate taxes on the Ranch paid by Travelers.

17. As of August 15, 1975 rents due to the State of Colorado for land leases were due and unpaid by CSPR. On or after August 15, 1975, Travelers paid $3,714.20 to the State of Colorado for lease payments, which sums have not been paid by CSPR to Travelers. Under the "Loan

Documents" the sums advanced for lease payments are obligations of CSPR to Travelers. CSPR remains obligated to Travelers for the $3,714.20 of lease payments made by Travelers.

18. Prior to the commencement of CSPR's Chapter XI proceeding, Travelers filed a judicial foreclosure proceeding in Huerfano County, Colorado, to foreclose on the Ranch.

19. CSPR and its officers were aware that Robert Palmes, Esq. often acted as Travelers' attorney in connection with Colorado real estate loans. Robert Palmes also agreed to prepare the mineral opinion on the Ranch, as required by Travelers, at CSPR's expense, and CSPR paid Robert Palmes $1,000 for such services. For this reason, among others, the Court finds that Mr. Palmes acted as attorney for both Travelers and CSPR in connection with the loan transaction.

20. At the time CSPR applied for the $900,000 loan, CSPR intended to subdivide the Ranch into 36 acre parcels for sale to the public. At all times relevant hereto, Travelers knew that CSPR intended to subdivide and sell the Ranch in 36 acre parcels.

21. Of the Travelers' loan proceeds, $590,895.54 was utilized to eliminate prior encumbrances on the Ranch. A substantial portion of the remaining loan proceeds were utilized by CSPR to subdivide the Ranch into 815 parcels of 36 acres or more in connection with its intention to sell 36 acre parcels to the general public. Other CSPR monies were also utilized in connection with the subdivision and sales program.

22. On July 5, 1973, at the time the "Loan Documents" were executed, the following standard form release provision was typed on to the Mortgage (Plaintiff's Exhibit 6):

Partial releases will be given by the Mortgagee hereunder at any time from the above-described lands provided that the note for which this Mortgage is the security is current in accordance with its terms and conditions and this Mortgage is not in default in accordance with its terms and conditions, upon payment of $50.00 per acre for lands requested to be released, plus $100.00 service charge per release and interest on the Note to date of Release. If the total amount of principal reduction in any one year, including the period from the date of this mortgage to January 1, 1975, exceeds the 1/5 option of the Note, a pre-payment penalty will be charged for the excess, according to the terms of the Note. The minimum acreage to be released at one time is 36 acres. Releases are to be made in such a manner as to leave no isolated tracks as remaining security. No Releases will be granted on the following described property until the loan is paid in full: [Property description omitted].

23. The following letters, executed by Travelers and received by CSPR prior to the execution of the Mortgage, contain substantially similar release provisions as quoted in Pasragraph 19 above [all principal, interest and costs incurred by Travelers were to be current prior to any partial release by Travelers]:

(a) A March 19, 1973 letter from Mr. Gregor (of Travelers) to Mr. Keller (Plaintiff's Exhibit 4);

(b) Travelers' June 14, 1974 commitment letter to CSPR (Debtor's Exhibit I).

24. Mr. Palmes, while acting as attorney for Travelers and for CSPR, knew that the release clause was insufficient to permit the property to be marketed. Nevertheless, Mr. Palmes insisted that the release clause be retained, and he stated he would clear up any resulting problem.

25. Mr. Keller and Mr. Palmes orally modified the release provisions of the Mortgage during their telephone conversations and meetings prior to and contemporaneous with the the execution of the Mortgage. By virtue of the oral modifications testified to by Mr. Keller, on behalf of CSPR, the Court finds that Mr. Palmes and Mr. Keller orally agreed that Travelers was obligated to release 36 acre parcels of the Ranch upon the receipt of $50.00 per acre, plus a $100.00 transaction charge, to all purchasers of CSPR who signed contracts with CSPR prior to any default by CSPR under the "Loan Documents". Travelers was not obligated to release 36 acre parcels which were sold after a default by CSPR unless the default was cleared and the loan was brought current. There is no evidence that Travelers ever agreed to execute releases of any parcels without receiving the payment of $50.00 per acre and $100.00 per transaction.

26. No documents were introduced into evidence or proffered which corroborate any oral modification of the release clause. The December 6, 1974 letter from Robert Palmes to CSPR (Debtor's Exhibit F) does not modify that portion of the release clause in the Mortgage (Plaintiff's Exhibit 6) which requires that the loan be current prior to a release by Travelers. Rather, Debtor's Exhibit F clarifies only that portion of the release clause which states that "Releases are to be made in such a manner as to leave no isolated tracts as remaining security."

27. No evidence was introduced or proffered to show that Mr. Palmes had implied and/or actual authority to orally modify the terms of the written mortgage, and no evidence was introduced that he did not have such authority and that he did act as attorney for Travelers in connection with the loan transaction.

28. No document was introduced into evidence or proffered whereby CSPR indicated any disagreement with the

terms of the release clause, as contained in the Mortgage, or in which CSPR gave Travelers notice that CSPR considered Travelers to have breached its obligation to execute partial releases. Further, no document was introduced into evidence or proffered indicating that CSPR denied it was in default under the "Loan Documents", except that CSPR did deny the default in its answer to Travelers' complaint herein.

29. In December 1974, CSPR, as debtor in possession, filed an application in the United States District Court for this district requesting approval of the sale of the entire Ranch to a Mr. Beaumont. Mr. Keller, on behalf of CSPR, signed an affidavit (Plaintiff's Exhibit 15) in support of the proposed sale. On December 27, 1974, United States District Judge Robert Firth entered his "Order Re: 'Sale of Assets' " (Plaintiff's Exhibit 15) approving the sale of the entire Ranch in accordance with the agreement attached to the Order. The agreement proposed by CSPR and approved by Judge Firth's Order contained the following language:

> "SELLER [CSPR] represents that the Ranch as above set forth is subject to a First Trust Deed or Mortgage in the sum of Nine Hundred Thousand Dollars ($900,000.00), plus some accrued interest in favor of TRAVELERS INSURANCE COMPANY (TRAVELERS). The Note evidencing said indebtedness is now in default for failure of SELLER to pay certain unpaid interest thereon to date plus SELLER'S failure to make a Thirty Thousand Dollars ($30,000.00) principal payment." [Plaintiff's Exhibit 16, page 1, Par. B].
>
> ". . . The obligation of the BUYER for the unpaid balance of the purchase price and the obligation of the SELLER to Travelers will remain in effect, except for such payments as will be made upon it or to reduce same by SELLER, it being understood that concur-

rently with the close of this transaction all payments and obligations owed to TRAVELERS shall be made current and any claimed default cured, with evidence thereof being delivered to BUYER." [Plaintiff's Exhibit 16, page 1, Par. C].

". . . Partial releases shall be made from the mortgage or Subdivision Trust by the SELLER-MORTGAGEE [CSPR] hereunder and from the TRAVLERS Mortgage at any time provided that the Note and security therefor is current in accordance with its terms and not in default in accordance with its terms, upon payment of One Hundred Dollars $100.00) per acre for lands requested to be released, (which amount shall apply to reduce the unpaid principal balance due) plus One Hundred Dollars ($100.00) service charge for any such release. Such sums as are required to TRAVELERS as to accomplish said release shall be paid from said funds. . . . All principal payments paid for releases shall be applied and paid on account of TRAVELERS principal obligation, and shall be paid to TRAVELERS in addition to the semi-annual and other payments due TRAVELERS." [Plaintiff's Exhibit 16, pages 3 and 4, Par. 2].

30. At no time in 1973, nor at any later time, did CSPR tender to Travelers the consideration of $50.00 per acre plus the $100.00 transaction charge for any partial release; CSPR did not request, in writing, that Travelers release any parcels; CSPR did orally request of Mr. Palmes that Travelers provide for the release of parcels which may be sold prior to foreclosure proceedings by Travelers, to be effective as far as a retail purchaser was concerned, even though CSPR was in default to Travelers.

31. In late 1973, Keller, on behalf of CSPR, orally asked Mr. Palmes if partial releases would be executed upon payment of $50.00 per acre plus $100.00, notwithstanding

that CSPR might become in default under the "Loan Documents". Mr. Palmes stated that partial releases would not be executed by Travelers unless the loan was current. By virtue of Mr. Palmes' refusal to acknowledge Travelers' obligation to execute partial releases notwithstanding CSPR's default under the "Loan Documents", Travelers breached the terms of the release clause of the Mortgage as orally modified. Because of Travelers' breach of the oral modification, CSPR ceased its business operations and Travelers is not entitled to foreclose until further order of this Court.

32. The highest and best use of the Ranch is as a subdivided tract to be sold to the general public in 36 acre parcels.

33. Because of the bond requirements herein set out, the Court is now not making any findings as to any particular amount of required working capital. If the bond be filed, there will be no requirement that any working capital be available, although as a practical matter if the bond requirement is met, the other needed funds would probably be available. CSPR introduced no evidence showing that it had any available source(s) of working capital loan proceeds, and CSPR presently has no significant cash.

34. In order for CSPR to commence its proposed program of selling 36 acre parcels of the Ranch to the public, CSPR will be required to comply with the subdivision regulations of the State of Colorado (Plaintiff's Exhibit 12, page 38, *et seq.*) and CSPR will be required to comply with the local laws, if any, which apply to CSPR in other states where CSPR sells. CSPR is not presently registered to sell parcels of the Ranch in any state.

35. The fair market value of the Ranch as of January 1, 1977 was a minimum of $2,500,000.00. The average gross sales price of subdivided parcels is a minimum of

$300 per acre, or approximately $8,742,300. The costs of sale to be incurred by CSPR are estimated at 40% of the gross sales price. It is anticipated that the gross sales price will be received in monthly payments over a 10-year period, which CSPR intends will carry interest.

36. By virtue of Travelers breach of the oral modification of the Mortgage release clause as found in Findings of Fact No. 30, as of the date this order becomes final and non-appealable, CSPR's debt to Travelers is limited to $962,220.88, consisting of the principal balance ($900,000) plus interest from July 5, 1973 to December 31, 1973 ($36,434.02), plus real estate taxes and lease payments advanced by Travelers ($25,786.86). Interest payments shall be paid after the Court's order becomes final and non-appealable, as set forth in the Conclusions and the Judgment.

37. In the event this Court's finding that Travelers breached the oral modification of the Mortgage release clause is not sustained by the appellate courts, CSPR's indebtedness to Travelers will aggregate $1,317,489.53 through and including November 8, 1976, consisting of interest due under the "Loan Documents", and attorneys fees and costs incurred by Travelers in connection with the foreclosure and the proceedings before this Bankruptcy Court.

38. As against CSPR, the indebtedness of CSPR to Travelers is secured by a valid and perfected first lien security interest in the Ranch and the Colorado leases which are the subject of the Collateral Assignment of State Leases.

39. Although CSPR introduced evidence disputing the amount and/or validity of the liens of record against the Ranch, for the purpose of the Complaint For Relief From Automatic Stay and the determination of whether CSPR has

equity in the Ranch, the following are deemed to be valid liens of record against the Ranch:

(a) J & L Electric, for its mechanics lien of $1,119.42 recorded on November 7, 1973, Book 334, Page 125 of the Official Records of Huerfano County, Colorado (Plaintiff's Exhibit 29).

(b) Southern Colorado Engineering Company, Inc., for its mechanic's lien of $26,374.94 recorded on December 26, 1973, Book 334, Page 768 of the Official Records of Huerfano County, Colorado (Plaintiff's Exhibit 30).

(c) Hydra-Electric Company, d/b/a Omnimetrics for its mechanic's lien of $39,897.31 recorded on December 27, 1973, Book 334, Page 792 of the Official Records of Huerfano County, Colorado (Plaintiff's Exhibit 31).

(d) Don Frank & Associates for its mechanic's lien of $29,484.40 recorded on December 22, 1973 in Book 334, Page 793 of the Official Records of Huerfano County, Colorado (Plaintiff's Exhibit 32).

(e) A Writ of Attachment and a Certificate of Levy filed in connection with a lawsuit commenced in the State of Colorado by *C & C Investment Company v. Robert J. Keller and CSPR* for $15,464.61. The Writ of Attachment was filed on June 5, 1974, Book 335, Page 909 of the Official Records of Huerfano County, Colorado (Plaintiff's Exhibit 33). The Certificate of Levy was filed on June 8, 1974, Book 335, page 971 of the Official Records of Huerfano County, Colorado (Plaintiff's Exhibit 34). The Court finds that this obligation has been paid and therefore does not constitute an encumbrance against the Ranch.

40. The Ranch is the major asset of CSPR and its use by the debtor and/or the sales program proposed by the debtor is the only means for the debtor's rehabilitation and is the only source for the formation of a Plan of Arrangement

for the payment of its secured claims and unsecured claims and other of its obligations.

41. To the extent any Conclusions of Law are deemed Findings of Fact, those Conclusions of Law are hereby incorporated herein as Findings of Fact.

CONCLUSIONS OF LAW

1. This Court has jurisdiction to determine the issues raised by the various pleadings between the parties.

2. The Court applies the law of the State of Colorado with respect to questions of usury, the Parol Evidence Rule and the Statute of Frauds.

3. CSPR has the burden of proving that: (1) CSPR is entitled to continuation of the automatic stay, (2) the release provisions of the Mortgage were orally modified, and (3) Travelers breached the oral modification of the release provisions of the Mortgage.

4. While the terms of the Mortgage are complete as set forth in the said written document, this Court may consider oral evidence introduced by CSPR for the purpose of modifying or contradicting the terms of the said written mortgage because Mr. Palmes while acting jointly as attorney for Travelers and for Colorado Spanish Peaks Ranch knew that the release clause was insufficient to permit the property to be marketed and agreed on behalf of both parties to the modification of the release clause. Such reasons are sufficient to provide an exception to the Parol Evidence Rule and the Statute of Frauds. Therefore, the testimony of Robert Keller as to oral conversations with Robert Palmes, and the conversations of Robert Palmes to Robert Keller prior to, contemporaneously with and subsequent to the execution of the subject promissory note and mortgage were all admissible into evidence and not subject to any exclusionary effect of the Parol Evidence Rule.

5. By virtue of disputes, equity in the property, and the need for use of the property in the Plan of Arrangement, this Court has the power to authorize CSPR, over the objection of Travelers, to sell the subject 29,000 acre mortgaged Ranch in 36 acre parcels, on credit, to individuals and to give the purchasers title, free and clear of Travelers lien upon the concurrent payment to Travelers of $50.00 per acre plus $100.00 per release request and payment, as long as CSPR is not in default in its obligations to Travelers as provided for in these Findings of Fact and Conclusions of Law and the Judgment entered concurrently herewith.

6. This Court has jurisdiction to supervise the sales by CSPR and/or to define the means of sales, the terms, the conditions and the basis for protection of the buyers, the creditors, CSPR and any other parties.

7. The following procedure is a fair means of sale which adequately protects Travelers as a secured creditor.

A. If those portions of this Court's Findings of Fact and Judgment which hold that: (1) Travelers breached an oral modification of the release provisions of the Mortgage, and (2) CSPR's indebtedness to Travelers is limited to $962,220.88, become final and nonappealable, then within 30 days after this Court's Judgment has become final and nonappealable, and prior to the sale of any portion of the Ranch by CSPR, CSPR shall:

(1) Pay to Travelers the sum of $30,786.86, consisting of interest accrued on the principal balance from July 5, 1973 to December 31, 1973 plus the real estate taxes and lease payments advanced by Travelers for the benefit of CSPR; and

(2) CSPR shall post with this court, for the benefit of Travelers, a corporate surety bond or undertaking, or cash, or a certificate of deposit in favor of Travelers to guarantee the payment to Travelers

of: (a) current real estate taxes on the Ranch; and (b) current lease payments on the leased land which is the subject of Travelers' Collateral Assignment of Lease; and (c) interest due on the unpaid principal balance due Travelers for the 6-month period commencing on the date the Judgment becomes final and nonappealable; and (d) the next annual principal payment due Travelers under the Note (Plaintiff's Exhibit 5) which amount is now fixed at $75,000, but the amount of the bond may be subject to modification by this Court after a noticed hearing upon the application of Travelers or CSPR. A copy of the bond or undertaking shall be served upon Travelers' counsel at the time the bond is posted. Travelers shall have 10 days after the bond or undertaking is received to except to the sufficiency of the sureties or the bond or undertaking. The requirements of this subparagraph for the posting of a bond or undertaking shall not be deemed satisfied until the time within which Travelers may except to the bond, undertaking or sureties has expired without such exception being filed with this Court. In the event that Travelers files an exception to the bond, undertaking or sureties, the requirements of this subparagraph shall not be deemed satisfied until this Court rules on the sufficiency of the bond, undertaking or the sureties. In the event Travelers objects to the sufficiency of the bond, undertaking or sureties, a hearing shall be set before this Court within 10 days thereof, and the time period within which CSPR must comply with the provisions of paragraph 7A shall be extended to the date set for the hearing on Travelers objection and such additional time, if any, as this Court may grant prior to the expiration of the time period, as extended.

(3) Thereafter, the periodic payments of principal and interest due from CSPR to Travelers under

the Note shall be paid to Travelers in accordance with the schedule set forth in the Note (as defined in the Findings of Fact), except that each payment date shall be deemed postponed by the amount of time elapsed from January 1, 1974, to the date this Judgment becomes final and nonappealable. For example, the first payment or principal and interest shall be due 6 months after this Court's Judgment becomes final and nonappealable, and the next interest payment shall be due 12 months after this Court's Judgment shall become final and nonappealable. Provided, however, the entire indebtedness due Travelers shall be due and payable on the third yearly anniversary after this Court's Order becomes final and nonappealable. CSPR is also required to pay when due all current real estate taxes and state lease payments as required by the "Loan Documents".

B. If those portions of this Court's Findings of Fact and Judgment which hold that: (1) Travelers breached an oral modification of the partial release provisions of the Travelers Mortgage and (2) CSPR's indebtedness to Travelers is limited to $962,220.88, are reversed by the appellate court(s), then within 60 days after the appellate court(s) ruling becomes final and nonappealable, and prior to the sale of any portion of the Ranch by CSPR, CSPR shall:

(1) Pay to Travelers all indebtedness then due and owing by CSPR to Travelers under the terms of the "Loan Documents", without acceleration, including all past due principal, interest and costs incurred by Travelers in connection with the loan transaction, and CSPR shall bring current all obligations to third parties as required by the "Loan Documents"; and

(2) CSPR shall post with this Court, for the benefit of Travelers, a corporate surety bond or undertaking, or cash, or a certificate of deposit in favor of Travelers, to guarantee the payment to Travelers of: (a) all current real estate taxes on the ranch; and (b) current lease payments on the leased land which is the subject of Travelers' Collateral Assignment of Lease; and (c) the next interest payment due Travelers under the "Loan Documents"; and (d) the next principal payment due Travelers under the "Loan Documents", which amount is now fixed in the amount of $75,000, but the amount of the bond may be subject to modification after a noticed hearing upon the application of Travelers or CSPR. A copy of the bond or undertaking shall be served upon Travelers' counsel, at the time the bond is posted. Travelers shall have 10 days after the bond or undertaking is received to except to the sufficiency of the sureties or the bond or undertaking. The requirements of this subparagraph for the posting of a bond or undertaking shall not be deemed satisfied until the time within which Travelers may except to the bond, undertaking or sureties has expired without such exception being filed with this Court. In the event that Travelers files an exception to the bond, undertaking or sureties, the requirements of this subparagraph shall not be deemed satisfied until this Court rules on the sufficiency of the bond, undertaking or the sureties. In the event Travelers objects to the sufficiency of the bond, undertaking or sureties, a hearing shall be set before this Court within 10 days thereof, and the time period within which CSPR must comply with the provisions of paragraph 7 B shall be extended to the date set for the hearing on Travelers objection and such additional time, if any, as this Court may grant prior to the expiration of the time period, as extended.

(3) Thereafter, CSPR shall pay, when due, all payments required by the "Loan Documents" as set forth therein. Provided, however, the entire indebtedness of CSPR shall be due and payable on the third yearly anniversary after the order of the appellate court(s) becomes final and nonappealable.

C. After each of the following conditions have been satisfied, CSPR may offer for sale to the general public 36 acre or larger parcels of the Ranch, in accordance with the terms and conditions set forth in this Court's Judgment and insofar as not inconsistent with this Judgment, such further Orders as this Court may hereafter enter:

(1) This Court's Judgment entered concurrently herewith shall have become final and nonappealable or the Order of the appellate court(s) shall have become final and nonappealable;

(2) CSPR shall have satisfied the terms and conditions of subparagraph 7 A (1) and (2) or 7 B (1) and (2) hereof, whichever are applicable; and

D. The sale of each individual 36 acre (or larger) parcel of the Ranch must be confirmed by an Order of this Court. No sale shall be confirmed by the Court unless Travelers shall have released the parcel to be sold as provided by subparagraph E hereof.

E. Provided that CSPR is in compliance with all the terms of this paragraph 7 and paragraph 7 of the Judgment, and upon payment by CSPR to Travelers by cashier's check of $50.00 per acre for lands requested to be released from Travelers' Mortgage plus a $100.00 service charge per release request and payment, Travelers shall execute a partial release from the Mortgage of the lands requested to be released for which payment has been received. Any payments of $50.00 per acre contemplated by this subparagraph

shall be applied to the principal balance of CSPR's indebtedness to Travelers and shall be credited against the periodic principal payments due Travelers as set forth in subparagraphs 7 A (3) or 7 B (3), whichever is applicable. Travelers shall be entitled to at least 15 days notice, in writing, of a request for release under this paragraph. Travelers' lien shall remain on those portions of the Ranch which have not been partially released by Travelers. Travelers shall not be required to issue partial releases of the portions of the Ranch specifically excluded from the partial release provision of the Mortgage until the loan is paid in full.

F. In the event there is a dispute between CSPR and Travelers as to whether or not Travelers is obligated to execute a partial release pursuant to subparagraph E hereof, either CSPR or Travelers may file an application with this Court for a determination of whether or not Travelers is required to execute a partial release. The Court shall, upon at least 10 days notice to CSPR and Travelers, set a hearing on the application. In the event that this Court enters an order upon such an application requiring that a partial release be executed, Travelers shall execute the partial release within 5 days from the entry thereof, or upon the failure to do so, this Court may enter an order effecting same.

G. CSPR, its officers, directors and agents shall not purchase any parcels of the Ranch except upon notice to Travelers and approval by this Court.

H. Within 10 days after receipt thereof, CSPR shall present to the Court, with copies to Travelers, a report evidencing all written offers to purchase individual lots or properties as well as all sales of such lots or properties, which CSPR proposes for confirmation.

I. CSPR may, upon approval of this Court, borrow against the net proceeds from the sale of any parcel

which has already been released from the Travelers' Mortgage.

J. CSPR shall comply with all applicable rules and regulations of the jurisdictions where parcels of the Ranch are sold.

8. In the event that CSPR shall become in default under any of the provisions of paragraph 7 hereof, Travelers may apply to this Court for a determination of whether or not CSPR is in default and the Court shall grant such application priority on its calendar. In the event that this Court determines that CSPR is in default under paragraph 7, CSPR shall have 10 days after the entry of said Order by this Court to cure the default. While CSPR is in default under paragraph 7 or if the default is not cured as provided in this paragraph, Travelers shall not be obligated to execute partial releases as provided in subparagraph 7E hereof. If the default is not cured by CSPR within 10 days after this Court enters its order determining that CSPR is in default, Travelers may, without further Order of this Court: (1) proceed against the bond posted pursuant to subparagraph 7A(2) or 7B(2), whichever has been posted, and (2) proceed with its judicial foreclosure under the "Loan Documents" or, at Travelers' option, request a deed in lieu of foreclosure of the collateral the subject of the "Loan Documents", which deed in lieu of foreclosure shall be executed by a duly authorized officer of CSPR immediately upon Traveler's request. However, should Travelers request the deed in lieu of foreclosure and should CSPR refuse to execute it, this Court shall enter its order conveying the collateral under the "Loan Documents" to Travelers.

Dated: December 19, 1977

/s/ Russell B. Seymour
RUSSELL B. SEYMOUR
BANKRUPTCY JUDGE

Memorandum and Addendum to Findings of Fact and Conclusions of Law.

United States District Court, Central District of California.

In re Colorado Spanish Peaks Ranch, Inc., Debtor.

The Travelers Insurance Company, a Connecticut corporation, Plaintiff, vs. Colorado Spanish Peaks Ranch, Inc., Defendants.

Colorado Spanish Peaks Ranch, Inc., etc., Cross-Complainant, vs. The Travelers Insurance Company, a Connecticut corporation, Cross-Defendant.

BK 74-11032-RS.

1. Travelers insists that the Court has now power to take into consideration the asserted fraudulent activity of its agent, in fixing the amount owing under the mortgage.

Conceivably this might be true were the Rule 11-44 complaint the only matter before the Court.

2. It will be noted, however, that the debtor in the first instance filed a complaint to sell free and clear of the lien claimed by Travelers. Travelers responded to that complaint with an answer, without urging any objection to summary jurisdiction.

3. Later Travelers filed its complaint under Rule 11-44 in connection with which the debtor filed a counter claim insisting that the mortgage had been created under fraudulent circumstances. Thereafter at the request of the Court the debtor consolidated in one complaint its complaint to sell free and clear of liens and its counter claim to the 11-44 complaint.

4. A trial was had on all matters and has resulted in the judgment being filed herewith.

5. It is true that Travelers asserted that neither the counter claim nor the complaint to sell free and clear stated a cause of action, but at no time did Travelers assert that the Court was without summary jurisdiction. Section 2(a)(7); Rule 915(a).

6. Following the trial itself and during the settling of the findings the Court suggested that under Bankruptcy Rule 715, which incorporates Federal Rules of Civil Procedure, 15, and in particular Rule 15(b), when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.

7. It is my view that in a complaint to sell free and clear of liens when no objection to summary jurisdiction is timely urged, the Court has the power to determine the priority, extent and validity of the lien in question[1] and that a determination of the so-called fraud issue goes to the validity and extent of the Travelers mortgage, as well as to the question of the amount of equity in the property.

8. Cases such as *Matter of Essex Properties*, 430 F.Supp. 1112, and the cases therein cited, including *In the matter of Ground Hog Mountain Corporation*, 1 Bankruptcy Ct. Dec. 923, and *In re Overmyer Company, Inc.*, 2 Bankruptcy Ct. Dec. 922, 994, on the surface might appear to the contrary but it would be noted that each involves a Rule 11-44 complaint only and does not involve a complaint to sell free and clear of liens tried without any timely objection to summary jurisdiction.

9. Judge Roy Babbitt in *Overmyer*, 2 B.C. Dec. 922, p. 994, footnote 2, notes this difference and arrives at his decision because the complaint was an 11-44 complaint and

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[1]See article by Frank R. Kennedy, Commercial Law League Journal, November 1974, 425, at 433, 434 and 435.

that the debtor had failed properly to respond to a motion for summary judgment. He stated: "The debtor could have challenged the security agreement, by bringing an adversary proceeding under Rule 11-61(2)".

10. This addendum shall be deemed a portion of the Findings of Fact and Conclusions of Law ending at page 26.

Dated: December 29, 1977

RUSSELL B. SEYMOUR
Judge

APPENDIX "D".

Petition for Rehearing (FRAP 40) and Certification Pursuant to Court Rule.

79-3533, 80-5257. United States Court of Appeals for the Ninth Circuit.

In re Colorado Spanish Peaks Ranch, Inc., Debtor.

The Travelers Insurance Company, a Connecticut corporation, Plaintiff/Cross-Defendant/Appellee, vs. Colorado Spanish Peaks Ranch, Inc., etc., Defendant/Cross-Complainant/Appellant. No. CV 79-3533. No. CV 79-04330. Docket No. 80-5257. No. BK 74-11032-RM-LTL.

Filed: November 25, 1981.

An Appeal From United States District Court, Central District of California.

ROBERT H. SHUTAN
MARC A. LEVINSON
SIDLEY & AUSTIN
1880 Century Park East
Los Angeles, California 90067
(213) 553-8100
Attorneys for Appellee

MARVIN NEBEN
NEBEN & STARRETT, INC.
180 Newport Center Drive
Suite 220
Newport Beach, California 92660
(714) 640-9933
Attorneys for Appellant-Petitioner

Petition for Rehearing (FRAP 40) and Certification Pursuant to Court Rule.

79-3533, 80-5257. United States Court of Appeals for the Ninth Circuit

In re Colorado Spanish Peaks Ranch, Inc., Debtor.

The Travelers Insurance Company, a Connecticut corporation, Plaintiff, vs. Colorado Spanish Peaks Ranch, Inc., etc., Defendants.

Colorado Spanish Peaks Ranch, Inc., etc., Cross-Complainant, Appellant, vs. The Travelers Insurance Company, a Connecticut corporation, Cross-Defendant, Appellee. Civil No. 79-3533. U.S. Court of Appeals Docket No. 80-5257. No. BK 74-11032-RM-LTL

The undersigned, Counsel of Record of Defendant, Cross-Complainants and Appellant, and Petitioner, Colorado Spanish Peaks Ranch, Inc. Debtor, certified that the following listed parties have an interest in the outcome of this case. These representations are made to enable Judges of the Court to evaluate possible disqualification or refusal:

Colorado Spanish Peaks Ranch, Inc.
Debtor
5828 Wilshire Blvd.
Los Angeles, CA 90035

Gilbert Robinson, Receiver of
Colorado Spanish Peaks Ranch, Inc., Debtor
1888 Century Park East, Suite 900
Century City, Los Angeles, CA 90067

Charles T. Morrison, Jr., of the law firm of
Moneymaker and Morrison
700 S. Flower, Suite 1702
Los Angeles, CA 90017
Attorneys for Official Creditors' Committee

Ray D. Keller
5828 Wilshire Blvd.
Los Angeles, CA 90035
(alleged co-maker of obligation)

Robert J. Keller
5828 Wilshire Blvd.
Los Angeles, CA 90035
(President of Debtor corporation)

Weldon Knight
P.O. Box 2806
Corpus Christi, Texas 78403

Dated: November 24, 1981

/s/ MARVIN NEBEN
MARVIN NEBEN,
a Member of
Neben & Starrett, Inc.,
Attorneys for
Colorado Spanish Peaks
Ranch, Inc.,
Debtor/Appellant

I. PETITION FOR REHEARING

The Appellant-Petitioner, hereby petitions this Court for a rehearing of the matters set forth on the within appeals pursuant to Rule 40, Federal Rules of Appellate Procedure (FRAP) with regard to the following particular points:

1. As to the value of the Ranch, pursuant to the findings of this Honorable Court:

> "Instead it (Spanish) called a witness who was not qualified as an expert who testified that if the Ranch were sold in parcels upon contract with 10%-15% down and the balance payable in installments over a ten-year period, the land sales would gross $300.00 per acre."

It is respectfully submitted that the within Honorable Court did not take into consideration that portion of the argument of the Appellant-Petitioner that competent evidence as to fair market value was presented to and received by the Court including the testimony of Mr. Conflenti, the real estate appraiser, in his report (Exhibit "EE" as set forth in transcript of September 7, 1976, pages 1371-1372) and further, testimony of the other witnesses including Mr. Rod Rumbaugh, an acknowledged experienced man in land sales programs (transcript of August 13, 1976, pages 1051 through 1151), and at page 1064 of the said transcript counsel for Travelers stated as follows:

> "This man is experienced. Mr. Neben has properly gone to the various organizations he worked for, the character of the work he did. No objection to that."

See page 22 of Appellant's Opening Brief) That further and on page 1073 of the transcript of August 13, 1976 the Court found that this particular witness was an "expert" for the purpose of being qualified to fix prices on property that is about to be sold.

2. This Honorable Court stated:

> "The District Court held that the testimony of Spanish's valuation witnesses was worthless because, among other things, it rested upon the assumption that the land would be subdivided, yet no cost had been shown for preparing the land for sale." and "The only relevant evidence of the market value of the property was that of Traveler's witnesses, that the market value was not in excess of one million three hundred forty thousand dollars ($1,340,000.00)."

It is submitted that the District Court, and this Honorable Court overlooked and did not deal with the matters presented in the Appellants brief in this matter and the issues raised on appeal relevant to the fact that the land had been completely subdivided and that the money borrowed from Travelers was used for that purpose. (See Findings of Fact and Conclusions of Law of Trial Judge No. 21 (CR 4) and further note that in said findings the Court found that

> "Other CSPR monies were also utilized in connection with the subdivision and sales program."

There has been no dispute over the fact that the subdivision was completed and that there was a sales program embarked upon. It was when Travelers refused to grant partial releases, or agreed to provide same for buyers, prior to the first payment being due to Travelers or prior to a default on the note, that the business terminated and the sales program was stopped. Therefore, there has never been an issue as to the fact that the property was not subdivided nor that there was a sales program, and accordingly the assumption that the District Judge based his determination, which has been affirmed by this Court, is factually incorrect, as there had been sales.

3. This Honorable Court found that the parole evidence was well established in Colorado and was applicable in this instance. The Court, did not, however, deal with the main

issue question of whether or not the parole evidence rule would be applicable where "fraud" was found to exist. The trial Court found that Spanish had been mislead and thus defrauded by the acts of Travelers, and found, therefore, that this would be an exception to the parole evidence rule. (Both in Colorado, See *Hall v. Linn*, 5P. 641, 8 Colo. 264, and, *Hall v. Rockwell* (1885) 6P. 927, 8 Colo. 103, and *Johnson v. Cummings* (1898) 55P. 269, 12 Colo. App. 17, as well as in California see *Southern California District Council, Assemblies of God, a corporation v. Shephard of the Hills Evangelical Lutheran Church* (1878) 77 Cal. App. 3d 951. These matters were presented to this Honorable Court in Appellant's Opening Brief pages 10-12 but were not dealt with in this Honorable Court's opinion or Order.

4. The posture of trial Court and Appellate Court: This Honorable Court did not deal with the issue presented by Appellant-Petitioner as to the posture of the Appellate Court relevant to rulings of the trial Court. It is to be noted that the District Judge, and this Honorable Court sitting as an Appellate Court should be held to Appellate posture, that is to determine whether or not the trial Judge should be reversed, remanded, or modified and the basis upon such. Rule 810 of the Rules of Bankruptcy Procedure deals with this matter as is set forth on pages 24-27 of Appellant's Opening Brief. District Court, as is this Court, Appellant in its nature in these circumstances. It took no testimony, did not see the witnesses, and could not tell, except from the transcripts, which witnesses were qualified and which were not. It could not tell, except for transcripts, which witnesses on cross-examination as "experts" were credible. Therefore, since there was competent evidence on every issue presented to the Court in some nature or degree, the weight of that testimony should be determined by the trial Judge and not be an Appellate Court unless, as set forth in

Rule 810 of the Rules of Bankruptcy Procedure, such findings are clearly erroneous. There is no finding in the District Courts opinion nor in the within Honorable Court's opinion and Order to such effect. Therefore this matter has not been dealt with by this Court in its decision having been raised by the Appellant-Petitioner on appeal.

5. That based upon the above second appeal which this Court found should accordingly have been denied, "in light of our decision on the first appeal" should likewise be reheard, and the matter redetermined with the findings on the issues as set forth hereinabove. Further, if the matter had been properly submitted returned to the Bankruptcy Court, on a remand, the Bankruptcy Court might have found other basis of proper valuation, or found for the proposition that sales might be had free and clear of liens with a transfer of the liens to the proceeds without the parole evidence testimony. This could be arrived at through the circumstances in the case and by virtue of the unquestioned proposition that this was the only asset of the estate and would be the only asset upon which a Plan of Arrangement could be formulated or confirmed. Therefore, the second appeal should have been likewise be reheard.

WHEREFORE, Appellant-Petitioner prays for rehearing and/or specificity in the opinion of this Court of the points of law or fact, dealing with the matter set forth hereinabove, not treated by, and apparently overlooked or perhaps misapprehended by this Honorable Court accordingly.

Dated: November 24, 1981

/s/ Marvin Neben
MARVIN NEBEN, a Member of
Neben & Starrett, Inc.,
180 Newport Center Dr., Suite 220
Newport Beach, California 92660

DECLARATION OF SERVICE BY MAIL

WAYNE NUCKOLS, the undersigned hereby declares:

Declarant is a citizen of the United States and is employed by the law firm of NEBEN & STARRETT, INC., 180 Newport Center Drive, Suite 220, Newport Beach, California, 92660. Declarant is over the age of eighteen years and not a party to the within action. On the 24 day of November, 1981, at the direction of Marvin Neben of said firm and a Member of the Bar of the United States District Courts, I served the within PETITION FOR REHEARING (FRAP 40) AND CERTIFICATION PURSUANT TO COURT RULE on the interest parties in this matter by mailing, with postage thereon fully prepaid, a true copy thereof to said attorney(s) at his or their known address; to wit:

Sidley & Austin
1880 Century Park East
Los Angeles, CA 90067

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Newport Beach, California, on the 24 day of November, 1981.

/s/ Wayne Nuckols
Declarant

Order.

United States Court of Appeals for the Ninth Circuit.

In re Colorado Spanish Peaks Ranch, Inc., Debtor.

The Travelers Insurance Company, a Connecticut corporation, Plaintiff-Cross-Defendant-Appellee, vs. Colorado Spanish Peaks Ranch, Inc., etc., Defendant-Cross-Complainant-Appellant. Nos. 79-3533, 80-5257.

Filed: December 8, 1981.

Before: DUNIWAY, PREGERSON, and CANBY, Circuit Judges

The petition for a rehearing is denied.

Opposition

Office - Supreme Court, U.S.
FILED
MAR 2 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1499

IN THE

Supreme Court of The United States

October Term, 1981

COLORADO SPANISH PEAKS RANCH, INC., etc.
(Defendant-Cross-Claimant-Appellant),

Petitioner,

THE TRAVELERS INSURANCE COMPANY, etc.
(Plaintiff-Cross-Defendant-Appellee),

Respondent.

Brief in Opposition to "Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Motion to Reverse Judgment of the Court of Appeals for the Ninth Circuit and the United States District Court for the Central District of California and to Reinstate Judgment of Bankruptcy Judge."

ROBERT H. SHUTAN,
SIDLEY & AUSTIN
2049 Century Park East
Los Angeles, CA 90067
(213) 553-8100
Counsel for Respondent.

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I.

INTRODUCTION AND SUMMARY OF ARGUMENT

The following is the brief response by The Travelers Insurance Company ("Travelers") to the Petition for a Writ of Certiorari filed by Colorado Spanish Peaks Ranch ("Spanish"). The gist of the response is: (1) the principal issue in the challenged decision

of the Ninth Circuit Court of Appeals was one of Colorado law, and the Ninth Circuit correctly interpreted Colorado law; (2) the Ninth Circuit applied the proper standard of appellate review, and the alleged conflict between the circuits concerning such standard is a false issue fabricated by Spanish; and (3) the transfer of lien issue is incomprehensible.

II.

STATEMENT OF THE CASE

The statement of facts in the Ninth Circuit's opinion (661 F.2d at 760) is more concise—and more accurate—than Spanish's rendition thereof in the Statement of Case portion of the Petition. Briefly stated, the operative facts are as follows:

In July of 1973, Travelers loaned $900,000 to Spanish taking a note, secured by a first mortgage on approximately 29,000 acres of Colorado ranch land which Spanish planned to subdivide and sell to the public. The first payment was due in January 1974; it was not made. Spanish has never made *any* payments on the loan, and, in addition, has been compelled to advance various property taxes and lease payments in order to protect its interest.

In 1974, Travelers filed a foreclosure proceeding in Colorado state court. In August 1974, Spanish filed the Chapter XI petition which automatically stayed the state court foreclosure proceeding. Travelers sought permission of the bankruptcy court to proceed with its judicial foreclosure, and Spanish counterclaimed, alleging breach of contract. It claimed that despite the existence of a standard form of release clause in the loan documents, the release clause was not binding on it because the attorney for Travelers had orally modified the written loan documents. The provision in dispute permits the release of a particular subdivision parcel on the payment of a set fee, "provided that at the time of the release CSPR (Spanish) was current in its obligations under the note and mortgage."

The principal officer of Spanish was permitted to testify that he had been told by the Travelers attorney "not to worry" about the clause as written. There is no written memorandum of any kind relating to any such alleged modification or interpretation. Nevertheless, the bankruptcy judge found that under Colorado law, the operative portion of the release clause had been modified.

The bankruptcy judge further found that the terms of the note and trust deed, as so modified, were breached when, late in 1973, the Travelers attorney stated that releases would not be executed by Travelers unless the loan were current. The judge also found that because of this breach, Spanish was forced to cease its business operations. He then awarded Spanish substantial damages for the alleged breach of the loan documents, as orally modified. Accordingly, the debt owing to Travelers was reduced by several hundred thousand dollars.

The bankruptcy judge then valued the ranch in order to ascertain whether Spanish had an equity therein and thus whether the automatic stay against lien enforcement should be continued. Travelers called two qualified appraisers; Spanish called an unqualified witness who, over objection, was permitted to opine as to value. The District Court found this witness unqualified and his testimony worthless, and the Ninth Circuit affirmed.

III.

ARGUMENT

A. The Ninth Circuit's Holding is Consistent with the Rulings of the Colorado Supreme Court

The first of the "Questions Presented" in the Petition challenges the Ninth Circuit's affirmance of the District Court ruling that parol evidence could not be introduced to modify the terms of the loan documents. Not only is this a question of Colorado law which does not qualify as a "special and important" reason for the

granting of the Writ, but the Ninth Circuit's ruling correctly follows a long and unbroken line of decisions by the Colorado Supreme Court (the state court of last resort) and by the Colorado Court of Appeals.

As noted in the relatively recent decision of the Colorado Court of Appeals cited by the Ninth Circuit (661 F.2d at 761), the parol evidence rule is still very much the law in Colorado, and thus oral agreements relating to the subject matter of a complete and unambiguous written document are inadmissible and have no binding effect. *See, e.g., Knuppel v. Moreland*, 148 Colo. 242, 366 P.2d 136 (1961); *Gordon Neon Co. v. Crim*, 528 P.2d 950 (Colo. App. 1974); *Kipp v. General Growth Properties*, 525 P.2d 510 (Colo. App. 1974); *David v. Hitti*, 480 P.2d 581 (Colo. App. 1970); *Stevens v. Vail Associates, Inc.*, 28 Colo. App. 344, 472 P.2d 729 (1970).

The parol evidence rule has been firmly established in Colorado for a hundred years, and Colorado Supreme Court cases following it are legion. *See, e.g., Snyder v. Board of Commissioners of Boulder County*, 8 Colo. 377, 8 P. 917 (1885); *Randolph v. Helps*, 9 Colo. 29, 10 P. 245 (1886); *Fitzgerald v. Burke*, 14 Colo. 559, 23 P. 993 (1890); *Doyle v. Nesting*, 37 Colo. 522, 88 P. 862 (1906); *Welles v. Colorado Nat. Life Assur. Co.*, 49 Colo. 508, 113 P. 524 (1911); *First Nat. Bank of Ouray v. Shank*, 53 Colo. 446, 128 P. 56 (1912); *Emerson-Brantingham Implement Co. v. Wood*, 63 Colo. 130, 165 P. 263 (1917).

At the district court, before the Ninth Circuit, and even here, in the United States Supreme Court, Spanish has asserted that the alleged oral modification should be deemed admissible under the so-called fraud exception to the Colorado parol evidence rule. Travelers pointed out below and must point out again that despite Spanish's contention that the bankruptcy court found that Spanish "had been defrauded or misled" (Petition at page 7), the bankruptcy court made no such finding. This devious and inexcus-

able attempt to mislead the appellate courts was rejected by the district court and by the Ninth Circuit, and this Court should do the same.

B. The Ninth Circuit Applied the Proper Standard of Appellate Review

The second of the "Questions Presented" allegedly revolves around the proper standard of review of factual findings by appellate courts. Spanish has even attempted to establish a conflict between the Ninth Circuit and other circuits over the standard of review.

This alleged issue merits little comment. The Ninth Circuit recognizes that the factual findings by the trier of fact must be followed unless such findings are clearly erroneous. *See, e.g., In re The Huntington Ltd.*, 654 F.2d 578, 583 (9th Cir. 1981); *In re Pedrazzini*, 644 F.2d 756, 758 (9th Cir. 1981); *In re Houtman*, 568 F.2d 651, 653 (9th Cir. 1978). The Circuit also understands that such findings should be given even greater deference when questions of credibility arise. *See, e.g., In re Nelson*, 561 F.2d 1342 (9th Cir. 1977); *In re Taylor*, 514 F.2d 1370, 1373-74 (9th Cir. 1975); *Union Bank v. Blum*, 460 F.2d 197, 200 (9th Cir. 1972).

In the instant matter, the Ninth Circuit did not deviate from that line of cases. It properly held that parol evidence was inadmissible, and that the release clause could not be orally modified. It further ruled that based on the *admissible* evidence, the values had to come out in a certain manner. Spanish seems to imply that so long as *any* evidence has been proferred, the trier of fact may rely on it and the resultant finding is inviolate. This, of course, is not the law; supportable findings must be based on admissible evidence. *Bumb v. Paulin Motor Co.*, 454 F.2d 1149, 1151 (9th Cir. 1972).

As to the conflict in the circuits, there is none having anything whatsoever to do with this case.

C. The Transfer of Lien Issue is Incomprehensible

The third of the "Questions Presented" is puzzling. The bankruptcy court did establish a complex procedure whereby Spanish could sell subdivisions over the objection of Travelers. *See* paragraph 7 of the judgment of the bankruptcy court, reprinted at page 12 *et seq.* of Appendix "C" of the Petition. It is unclear to Travelers what Spanish believes the issue is. Whatever it is, though, it is certainly not so special and important that it should concern the United States Supreme Court. Travelers respectfully submits that whatever it is that Spanish is seeking this Court to decide in Question No. 3, such issue is not a question on which this Court should waste its valuable time.

IV.

CONCLUSION

The primary issue involved in this case is one of Colorado state law. The Ninth Circuit disposed of that issue by following an unquestioned line of Colorado Supreme Court and Colorado Court of Appeals cases. The two other "questions presented" were properly decided by the Ninth Circuit, and neither is of such import as to merit any of this Court's time. Travelers submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT H. SHUTAN,
SIDLEY & AUSTIN
2049 Century Park East
Los Angeles, CA 90067
Counsel for Respondent

Dated: March 1, 1982.

CERTIFICATE OF SERVICE

I, Robert H. Shutan, declare:

1. I am a member of the Bar of the Supreme Court of the United States, and am counsel to The Travelers Insurance Company, Respondent herein.

2. Pursuant to Rule 28.3 of the Rules of this Court, on March , 1982, I caused the foregoing "Brief in Opposition to 'Petition for a Writ of Certiorari . . .' " to be served on the Petitioner, Colorado Spanish Peaks Ranch, Inc., by depositing three copies of the same in a United States mailbox at Los Angeles, California, with first-class postage prepaid, addressed as follows:

Marvin Neben, Esq.
Neben & Starrett, Inc.
180 Newport Center Drive
Newport Beach, California 92660

I declare under penalty of perjury that the foregoing is true and correct.

At Los Angeles, California this day of March, 1982.

ROBERT H. SHUTAN